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Oct. 7. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 243.

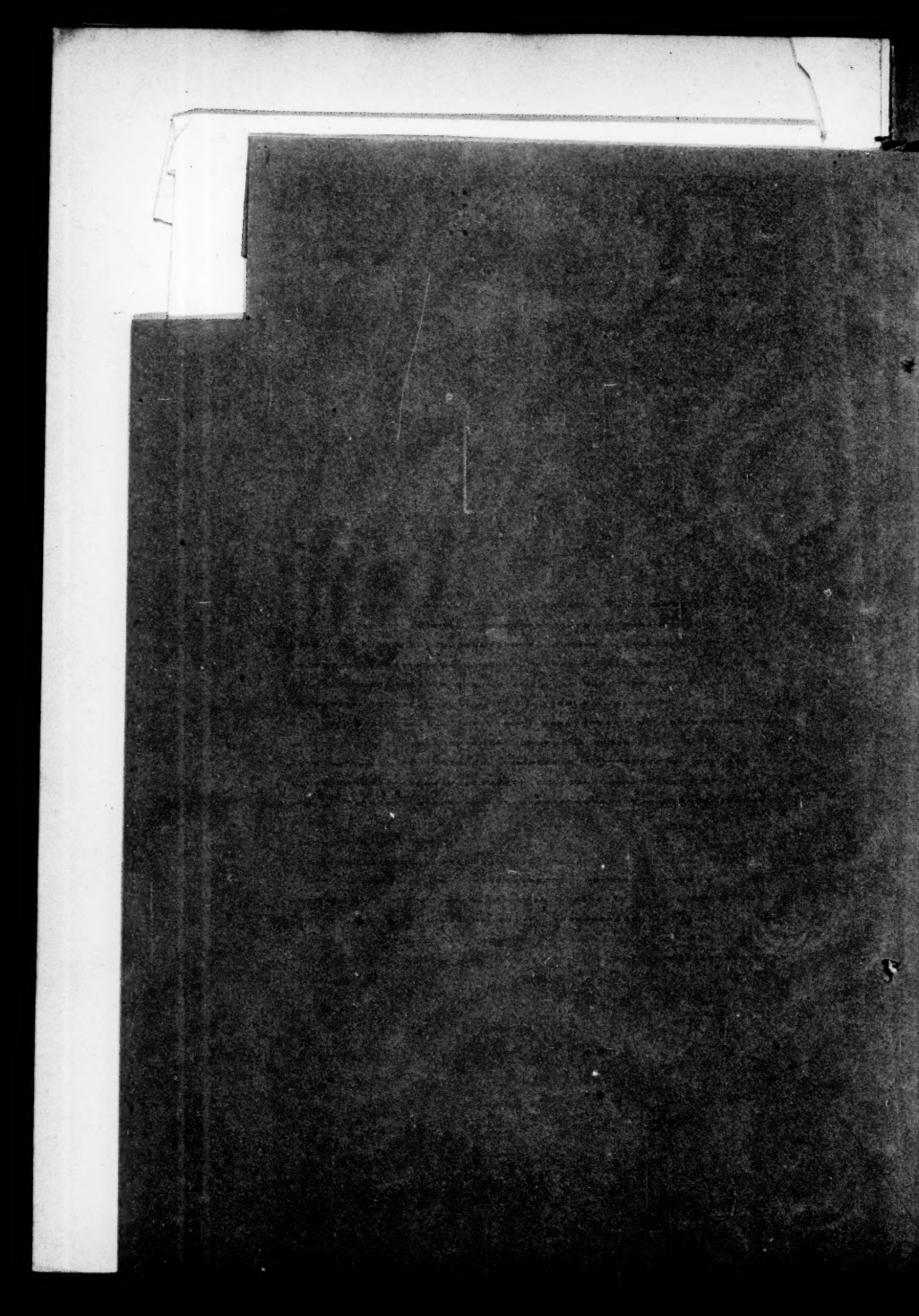
GARDNER COLBY, PLAINTIFF IN ERROR,

vs.

GEORGE REED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 14, 1876.



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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee on the first Monday (being the third day) of January, A. D. 1876—

Present, the honorable Charles E. Dyer, district judge, presiding; Charles S. Hamilton, marshal; Edward Kurtz, clerk—

Among other, the following proceedings were had, to wit:

GEORGE REED, PLAINTIFF,
vs.
GARDNER COLBY, DEFENDANT. } At law.

Be it remembered that heretofore, to wit, on the 27th day of May, A. D. 1875, came the above-named plaintiff, by his attorneys, Mess'rs Carpenter and Murphey, and filed their præcipe for a summons against the above-named defendant, as follows, to wit:

Præcipe for summons.

Circuit court of the United States, eastern district of Wisconsin.

GEORGE REED
vs.
GARDNER COLBY. } Action for money demand.

2 The clerk of said court will please issue a summons in the above-entitled action, returnable according to law, ad damnum three hundred thousand dollars.

CARPENTER & MURPHEY,
Attorneys for Plaintiff.

And also filed bond for costs, approved by the clerk.

Whereupon a summons issued, returnable according to law, as follows:

3 Circuit court of the United States for the eastern district of Wisconsin.

GEORGE REED, PLAINTIFF,
vs.
GARDNER COLBY, DEFENDANT.

Summons on money demand. Complaint not served.

The President of the United States of America to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in this action, which will be filed in the office of the clerk of this court, at Milwaukee, in said district. And you are also required to file your answer thereto in said clerk's office at Milwaukee and to

serve a copy thereof on the attorneys of the plaintiff, whose names are subscribed hereto, at their office, in Milwaukee, Wis., within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of three hundred thousand dollars, besides the costs of this action. The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this 27th day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the 99th.

[SEAL.] EDWARD KURTZ, *Clerk.*

CARPENTER & MURPHEY, *Attorneys.*

4 Served on the within-named Gardner Colby by delivering to him personally a copy of this summons this 27th day of May, A. D. 1875.

C. S. HAMILTON, *Marshal.*

Fees: Service, 2.00; copies, .20: hack, 1.00—$3.20.

(Indorsed:) Law docket C. George Reed vs. Gardner Colby. Summons on money demand. Filed May 28, 1875.

5 JUNE 28, 1875.

This day came the plaintiff, by his attorneys, and filed his complaint, as follows:

Complaint.

Circuit court of the United States for the eastern district of Wisconsin.

GEORGE REED
vs.
GARDNER COLBY.

The complaint of George Reed, plaintiff, by Carpenter & Murphy his attorneys, shows to the court:

I. That said plaintiff is a citizen of the State of Wisconsin, and that said Gardner Colby is a citizen of the State of Massachusetts, and was duly served with process herein in the said district.

II. That on and prior to December 3d, A. D. 1870, the Portage, Winnebago and Superior Railroad Company was a corporation organized and existing under the laws of the State of Wisconsin, and by the laws of said State was authorized to build and operate a railroad from Portage City, and from Doty's Island, by the way of Stevens Point, to Superior City, on Lake Superior; and the Manitowoc and Minnesota Railroad Company was another corporation existing under the

6 laws of said State, and by the laws of said State was authorized to build and operate a railroad from Manitowoc to the Mississippi River, and (with the assent of the legislature of the State of Minnesota) to the city of S't Paul, in Minnesota; and Elijah B. Philips and Charles L. Colby, copartners, doing business under the firm name of Philips & Colby, were contractors of each of said companies for the construction of the roads which said companies were respectively authorized to

build and operate as aforesaid, and had contracts with each of said companies in that behalf.

III. That prior to the 3d day of December, A. D. 1870, the said defendant had subscribed the sum of two hundred thousand dollars towards a fund to build the roads of said railroad company, fifty thousand dollars whereof the said defendant had subscribed for and on account of said plaintiff.

IV. That the said defendant, on the 3d day of December, A. D. 1870, at the city of Boston, in the State of Massachusetts, made, executed, and delivered to said plaintiff his, said defendant's, deed or contract in writing, signed with the hand and sealed with the seal of the said defendant, wherein and whereby he, the said defendant, covenanted and agreed to and
7 with the said plaintiff that he, said defendant, would pay in said sum of two hundred thousand dollars on his said subscription, as assessments should thereafter from time to time be made thereon, and that he would take and procure from said Philips and said Charles L. Colby, contractors, or their successors as provided in their contracts with said railroad companies, certificates of payments made, which should entitle the holder thereof to an equal amount of full-paid preferred and interest-bearing stock in said railroad companies, and to the proportion of eight-fourteenths of the nett profits arising from the construction of said roads under the contract therefor which two hundred thousand dollars bears to the sum of two millions of dollars, subscribed as aforesaid, in money, bonds, stock, or lands, including said preferred stock; and that he, said defendant, would pay over or deliver upon the order of said plaintiff one equal fourth part thereof up to the amount of said fifty thousand dollars, less ten per cent. thereof, to wit, five thousand dollars, or such proportionate amount of said ten per cent., to wit, of said five thousand dollars, as might be due to the said Charles L. Colby, and agreed to be paid to him by said plaintiff.

8 V. That said defendant did pay his said subscription as he agreed as aforesaid to do, and did obtain and receive on account of such payment two hundred thousand dollars of said preferred interest-bearing stock before the commencement of this action, forty-five thousand dollars of which it became & was the duty of said defendant to deliver over to the plaintiff as said defendant had agreed to do; but that the said defendant, disregarding his obligation in the premises, refuses so to deliver the same to the plaintiff, although the said defendant, at Milwaukee, in said district, after said defendant had received and obtained the same as aforesaid, and on or about the 30th day of May, A. D. 1875, was by said plaintiff requested so to do; that said forty-five thousand dollars of said preferred interest-bearing stock was worth the sum of forty-five thousand dollars when said plaintiff demanded the same as aforesaid, and when the said defendant refused to deliver the same on the day and year last aforesaid.

Wherefore the plaintiff demands the judgment of said court for the sum of forty-five thousand dollars with interest thereon since May 30th, 1875, together with the costs of this action.

9 CARPENTER & MURPHEY,
Plaintiff's Attorneys.

EASTERN DISTRICT OF WISCONSIN, *ss:*

George Reed, being first duly sworn, on oath, says that he has read the foregoing complaint; that he knows the contents thereof; that he is the plaintiff named therein, and that the statements therein contained

are true of his own knowledge except those stated on information & belief, & that as to those he believes it to be true.

GEO. REED.

Subscribed & sworn to before me this 26th day of June, A. D. 1875.
EDWARD KURTZ, *Clerk.*

AUGUST 14, 1875.

This day came the defendant, by his attorneys, Mess'rs Dixon, Hooker & Palmer, and filed his demurrer, as follows:

Demurrer to complaint.

Circuit court of the United States for the eastern district of Wisconsin.

GEORGE REED, PLAINTIFF,
against
GARDNER COLBY, DEFENDANT.

The above-named defendant, by Dixon, Hooker & Palmer, his attorneys, demurs to the complaint of said plaintiff, and for cause of demurrer alleges that said complaint does not state facts sufficient to constitute a cause of action.

DIXON, HOOKER & PALMER,
Def't's Att'ys.

10 *Demurrer overruled.*

OCTOBER 13, 1875.

This day came the parties, by their counsel, and the demurrer to the complaint in this cause having been argued by the said counsel, on consideration thereof it is ordered by the court that the said demurrer be and hereby is overruled.

And it is further ordered that the defendant have leave to answer the complaint by the second Monday of November next.

DECEMBER 4, 1875.

This day came the defendant, by his attorneys, and filed his answer, as follows:

Answer.

Circuit court of the United States for the eastern district of Wisconsin.

GEORGE REED
ag'st
GARDNER COLBY.

The above-named defendant, for answer to the complaint of the plaintiff herein, says that he did not on or about the 30th day of May, A. D. 1875, or at any other time, refuse to deliver to the said plaintiff the preferred stock mentioned and set forth in said complaint, and which the said plaintiff was at the time of his said pretended demand entitled to demand or receive of or from this defendant.

And this defendant, further answering, says that no sufficient or

11 proper demand or request for the delivery of said stock by this defendant to the said plaintiff, was made by the said plaintiff upon or to this defendant, because he says that the said plaintiff required and insisted upon the delivery of a much larger amount of said stock than was due and owing by this defendant to the said plaintiff.

And this defendant, further answering, says that the demand of the said plaintiff was, as set forth in said complaint, for the delivery of the sum of forty-five thousand dollars of said stock, when in truth and in fact the said plaintiff was entitled to demand and receive of and from this defendant only the sum of thirty-two thousand dollars of said stock.

And defendant further says that he did not at the time of the said pretended demand refuse to deliver to the said plaintiff the said amount of thirty-two thousand dollars of stock, but was then ready and willing, and still is ready and willing, to deliver the same to the said plaintiff, provided the said plaintiff will accept and receive the same.

And defendant further says that the demand of the said plaintiff being for the sum of forty five thousand dollars of said stock and no less, and the plaintiff then and there insisting upon the delivery of the same, it became and was impossible for this defendant to comply

12 with said demand, wherefore this defendant did not and could not comply with the same.

The defendant, further answering, shows that on the 16th day of May, 1871, it was agreed by and between said plaintiff and this defendant in writing that in case it became necessary for this defendant to increase his subscription to the fund to build the said railroad mentioned and set forth in said complaint, from the sum of two hundred thousand dollars to the sum of three hundred thousand dollars, and to pay the same, that then this defendant should have and retain out of the subscription of the said plaintiff, or the sum subscribed for the benefit of the said plaintiff, the amount of five thousand dollars, or the excess above forty thousand dollars, the sum of five thousand dollars of said subscription for the benefit of said plaintiff having already been deducted therefrom as due to Charles L. Colby, as stated in said complaint. And defendant says that it became and was necessary for him to subscribe the additional sum of one hundred thousand dollars to said fund and to pay the same, and that he did subscribe and pay the same, by reason whereof, and by the terms of said agreement between this defendant and the said plaintiff, the subscription for the benefit of the said plaintiff was reduced to the sum of forty thousand dollars.

13 And the defendant, further answering, says that on the 16th day of May, 1871, the said plaintiff applied to this defendant to loan to him, the said plaintiff, the sum of two thousand dollars on six months' time, the said plaintiff proposing that this defendant should hold as security for the payment of said loan the amount of eight thousand dollars of said stock, which loan was made and proposition accepted by this defendant. And defendant says that no part of the said sum of two thousand dollars so loaned as aforesaid has been repaid to him by the said plaintiff, and that the whole of the same, with the interest thereon, is now due and owing to this defendant from the said plaintiff.

This defendant, further answering, by way of counter-claim, says that the said plaintiff is indebted to him, the said defendant, in the sum of two thousand dollars, with the interest thereon from the 16th day of May, A. D. 1871, which said sum this defendant claims to offset and have deducted from any sum which the said plaintiff may have and recover of and from this defendant in this action.

And this defendant, further answering, says that the value of the said stock at the time of said demand was and now is much below par, and that the said amount of eight thousand dollars thereof, so pledged to him as aforesaid in security for the payment of said loan, is greatly inadequate to that purpose, and much less in value than
14 the said sum of two thousand dollars and interest so due and owing to this defendant from the said plaintiff, as above stated.

DIXON, HOOKER & PALMER,
Defendant's Attorneys.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Gardner Colby, being first duly sworn, says that he is the defendant in the above-entitled action; that he has heard the foregoing answer read and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

GARDNER COLBY.

Subscribed and sworn to before me this 30th day of November, A. D. 1875.

[SEAL.] EDWIN H. ABBOTT,
Commissioner of the United States Court, Massachusetts.

JANUARY 3, 1876.

Notice to defendant's attorneys to produce books, papers, &c., filed, as follows:

Notice to produce papers, &c.

Circuit court of the United States for the eastern district of Wisconsin.

GEORGE REED
against
GARDNER COLBY.

Take notice that you are hereby required to produce upon the
15 trial of this cause the original subscription, dated the 18th day of July, 1870, to the preferred capital stock in the Manitowoc & Minnesota and the Portage, Winnebago & Superior Railroad Companies, since consolidated and now known as the Wisconsin Central Railroad Company, and the stock certificate and stock transfer books, and all contracts, papers, & memoranda relating to the stock of said company or companies above named, and the books and memoranda showing the amount of bonds issued, sold, and transferred by said company, and all contracts made by either of the above-named railroad companies with Elijah B. Phillips and Charles L. Colby, and with the Phillips & Colby Construction Company, and all books of accounts or memoranda showing the transactions between said railroad companies, or either of them, with the said Phillips & Colby and the Phillips & Colby Construction Company, and the amount of money or other consideration paid to them under said contracts, showing the cost of the construction and operation of the road of said company, and all reports, papers, estimates, or documents showing the value of said roads and property of said company, and all contracts and agreements between the said Phillips & Colby and the Phillips & Colby Construction Company and the said Gardner Colby, defendant.

You are further required to produce any and all other documents & writings in your control which relate in any wise to the matters in controversy in the action.

16

Dated Milwaukee, January 3d, A. D. 1876.

CARPENTER & MURPHEY,
Att'ys for Plaintiff.

To DIXON, HOOKER, WEGG & NOYES,
Attorneys for Defendant.

And now, at this same term, January term, A. D. 1876, and on the thirteenth day thereof, to wit, on the 17th day January, A. D. 1876, the following proceedings were had, to wit:

Trial.

GEORGE REED, PLAINTIFF,
vs.
GARDNER COLBY, DEFENDANT. } At law.

This day came the parties by their counsel, Mess'rs Goodwin and Thompson appearing for the plaintiff, and Mess'rs L. S. Dixon and E. H. Abbott for the defendant, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit, Asa Carpenter, S. M. Billings, H. D. Jennings, J. D. Huntley, Peter Klos, George Beaumont, Rudolph Wald, Charles P. Lovell, S. H. Van Schaick, A. A. Loper, Joseph C. Lukes, and Lorenzo Merrill, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded, the same was adjourned until to-morrow morning.

17

JANUARY 18, 1876.

This day came the parties by their counsel, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

JANUARY 19, 1876.

This day came the parties by their counsel, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

JANUARY 20, 1876.

This day came the parties by their counsel, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

JANUARY 21, 1876.

This day came the parties by their counsel, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until Monday afternoon next.

JANUARY 24, 1876.

This day came the parties by their counsel, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

JANUARY 25, 1876.

This day came the parties, by their counsel, and the trial of the issue herein was resumed.

And the jurors of the jury aforesaid being charged by the court,
18 retired to their room under the charge of a sworn officer to consider of their verdict, and afterwards came into court, and on their said oaths respectively do say that they find in reply to the following questions propounded by the court, and answer the same as follows:

Verdict.

First. Did the plaintiff before the commencement of this action demand from the defendant the stock in question?

Answer. We find there was a demand.

Second. If the plaintiff did, before the commencement of this action, demand from the defendant the stock in question, did the defendant refuse to deliver the same?

Answer. He did.

Third. Did the plaintiff and defendant enter into the agreement of May 16, 1871, set forth in the answer, by which the former was to release to the defendant the excess above $40,000 of the stock originally subscribed for the plaintiff in the event it should become necessary to subscribe an additional $100,000 to the stock of the railroad company? If so, did the defendant in good faith judge and determine it to be necessary for him so to subscribe, and did he so subscribe and pay for such additional stock in pursuance of such agreement?

Answer. We answer the above question in the affirmative.

Fourth. If such agreement was entered into, and if, in the
19 judgment of defendant, it became necessary for the defendant to subscribe an additional $100,000 to said stock, and if he did subscribe and pay for the same, did the defendant give the plaintiff the 30 days' notice mentioned in the agreement; and, if not, was such notice waived by the plaintiff?

Answer. Notice was waived.

Fifth. If the plaintiff demanded from the defendant the stock in question, what amount of stock at its face, if any, was the plaintiff then entitled to demand and receive?

Answer. Thirty-two thousand dollars.

Sixth. What was the cash value of the stock to which you find the plaintiff entitled, if any, on or about the 27th day of May, 1875?

Answer. Nine thousand and six hundred dollars.

Seventh. Has there been any change in the value of said stock, and if so, what from that day down to the time of the rendition of your verdict?

Answer. No change.

And came the plaintiff by his counsel and moved the court that judgment be entered upon and pursuant to said verdict.

Renewal of def't's mo. that pl'ff be ordered to take stock.

JANUARY 31, 1876.

This day came the defendant by his counsel and renewed his
20 motion made on the trial, that the plaintiff be ordered and directed to accept the stock, the value of which he sued for in this

action, in mitigation of the damages herein, the defendant submitting and offering to pay all costs of said action and all special damages herein, and further moved the court for a new trial for reasons filed.

Order overruling said motions & judt for plff.

APRIL 12, 1876.

This day came the parties by their counsel, and the motion of the defendant that the plaintiff be ordered and directed to accept the stocks, the value of which he sued for in this action in mitigation of the damages herein, and also the motion of the defendant for a new trial having heretofore been argued by the said counsel, on consideration thereof it is ordered by the court that the said motions be and hereby are overruled.

Whereupon it is considered and adjudged by this court now here that the said plaintiff do have and recover of the said defendant, Gardner Colby, the sum of nine thousand six hundred dollars, being the value on the 27th day of May, A. D. 1875, of the stock in controversy, which the said plaintiff was entitled to receive from the said defendant on the said 27th day of May, A. D. 1875, as found by the special verdict
21 of the jury upon the trial of this cause together with five hundred and eighty-eight dollars interest thereon from said date, making in all the sum of ten thousand one hundred and eight-eight dollars.

And it is further ordered and adjudged that the counter-claim of said defendant for the sum of two thousand five hundred and forty-six dollars and twenty-eight cents ($2,546.28), being the amount of two thousand dollars and interest thereon from the 16th day of May, A. D. 1871, as alleged in the defendant's answer, be deducted from said sum of ten thousand one hundred and eighty-eight dollars, and that the said plaintiff have and recover of the said defendant, Gardner Colby, the sum of seven thousand six hundred and forty-one dollars and seventy-two cents, being the balance thereof, together with forty-nine dollars and eighty-two cents, his costs about his said suit in this behalf by him expended, and that he have execution thereof.

Judgment roll filed April 12th, A. D. 1876.

EDWARD KURTZ, *Clerk.*

Damages, $7,641.72; costs, $49.82—$7,691.54.

APRIL 14, 1876.

Substitution of George B. Goodwin and John I. Thompson as plaintiff's attorneys with notice of substitution served on def't's attorneys filed as follows:

22 *Substitution of attorneys for plff.*

Circuit court of the United States, eastern district of Wisconsin.

GEORGE REED
against
GARDNER COLBY.

We hereby consent that George B. Goodwin and John I. Thompson, of the city of Milwaukee, be substituted in our place as attorneys and counsel for the above-named plaintiff in this action.

Dated Milwaukee, April 14th, 1876.

CARPENTER & MURPHEY,
Plff's Att'ys.

APRIL 22, 1876.

This day came the defendant, by his counsel, and on his motion and by consent, it is ordered by the court that the time for him to file a bond for supersedeas in this cause be and hereby is extended ten days.

MAY 1, 1877.

This day came the defendant and filed his bond in the sum of sixteen thousand dollars, with Charles L. Colby, of Milwaukee, and James W. Converse, of Boston, Mass., as sureties, conditioned to prosecute a writ of error to effect and answer all damages and costs if he fail to make his plea good, which bond is approved by the district judge, and is as follows:

Bond for supersedeas.

Know all men by these presents that we, Charles L. Colby, of
23 the city and county of Milwaukee, and State of Wisconsin, and James W. Converse, of the city of Boston, and county of Suffolk, and State of Massachusetts, are held and firmly bound unto George Reed, of the city and county of Manitowoc, in the State of Wisconsin, in the full and just sum of sixteen thousand dollars, to be paid to the said George Reed, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately, at a term of the circuit court of the United States for the eastern district of Wisconsin, begun and held at the city of Milwaukee, in said district, on the first Monday in January, A. D. 1876, in a suit depending in said court between George Reed, plaintiff, and Gardner Colby, defendant, judgment was on the 12th day of April, 1876, during said term, rendered against the said Gardner Colby for the sum of seven thousand six hundred and forty-one dollars and twenty-two cents damages, and forty-nine dollars and eighty-two cents costs of suit, and the said Gardner Colby having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said
24 George Reed citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said Gardner Colby shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his said plea good, then the above obligation to be void; else to examine in full force and virtue.

GARDNER COLBY. [SEALS.]
CHA'S L. COLBY. [SEAL.]
J. W. CONVERSE. [SEAL.]

Sealed and delivered in presence of—
EDWIN H. ABBOTT.

Approved by—

CHA'S E. DYER, *Judge.*

UNITED STATES OF AMERICA.
District of Massachusetts, ss:

I certify that on the twenty-seventh day of April, A. D. eighteen hundred and seventy-six, personally came and appeared before me, a commissioner of the United States circuit court for the district of Massachusetts, Charles L. Colby, who, being first sworn to tell the truth, the whole truth, and nothing but the truth touching the matters and things whereof he should be examined, did depose and say:

I am a citizen of Milwaukee, in the State of Wisconsin, and am worth the full sum of sixteen thousand dollars over and above all debts and liabilities now resting upon me, and over and above all property
25 which is exempt by law from attachment or execution, and am able to respond for the full amount intended to be secured by the within written bond.

CHA'S L. COLBY.

Subscribed and sworn to before me the day and year above written.
[SEAL.] EDWIN H. ABBOTT.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I certify that on the twenty-seventh day of April, A. D. eighteen hundred and seventy-six, personally came and appeared before me, a commissioner of the United States circuit court for the district of Massachusetts, James W. Converse, of Boston, who, being first sworn to tell the truth, the whole truth, and nothing but the truth touching the matters and things whereof he should be examined, did depose and say:

I am a citizen of Boston, in the State of Massachusetts, and am worth the sum of sixteen thousand dollars over and above all debts and liabilities now resting upon me, and over and above all property which is exempt by law from attachment or execution, and am able to respond for the full amount intended to be secured by the within written bond.

J. W. CONVERSE.

Subscribed and sworn to before me the day and year above written.
26 [SEAL.] EDWIN H. ABBOTT.

Whereupon a writ of error and citation issued and a copy of said writ of error lodged for the defendant in error.

27 JULY 6*th*, 1876.

Bill of exceptions signed and filed, as follows, to wit:

Bill of exceptions.

Circuit court of the United States, eastern district of Wisconsin.

GEORGE REED, PLAINTIFF,
vs.
GARDNER COLBY, DEFENDANT.

Be it remembered that afterwards, to wit, at a regular term of the said circuit court for the eastern district of Wisconsin, begun and holden at the court house in the city of Milwaukee, in said district, on the first

Monday in January, A. D. 1876, before the honorable Charles E. Dyer, judge, the issues heretofore joined by the respective parties in the above-entitled action came on to be heard, at which time and place came as well the plaintiff, George Reed, by his attorney & counsel, George B. Goodwin, as the defendant, Gardner Colby, by his attorney & counsel, L. S. Dixon, and the jurors of the jury being called, likewise came, and after being empanneled, tried, and sworn to well and truly try the said issues, the plaintiff, to maintain the issues upon his part, by his said counsel, George B. Goodwin, called as a witness the said plaintiff,

GEORGE REED, who, being duly sworn, testified as follows:

28 Know defendant, Gardner Colby; he resided at commencement of this suit, & now resides, in Boston. I am plaintiff. I made 3 separate demands on defendant for the amount of stock, $45,000, mentioned on the stand, two at Boston & another here; wrote him a letter from New York to bring stock to Milwaukee about 20th April; think date of demand in Boston was about 20th April, 1875. I stated I wrote him from New York requesting, as I could not return to Boston, to bring stock to me & deliver at Milwaukee. On my arrival at Milwaukee last of May, met Colby, & asked if he had brought that stock—that I wanted it. He did not give me stock; has never given it. I suppose stock had been issued at time I made first demand; by terms of subscription it was to have been issued when dated. The subscription list will show what time. I understood from him it had all been issued; so understood him at the time. I made first demand in 1873; think in February. Second in April, 1875.

Cross-examination:

Think that is letter I wrote from New York, the one I spoke of, dated April 29, 1875. Think I have Colby's reply to that letter among my papers; haven't it here. Some of my papers are at Manitowoc, some at Madison, some at the Newhall. Can't tell where this letter is without examination. Will examine my papers at Newhall. & see if it is there. I made demand here in Milwaukee at the Wis. Cent. R.

29 R. office 30 May, same day alleged in complaint—think it was. Don't know who were present when I first spoke to Colby. There were persons present when I made demand, at meeting of stockholders to elect directors. When I met Colby & shook hands & asked him for stock—said I wanted it—think there were other parties present. There was Cha's Colby, M'r Button present during meeting. Can't say that they were in the room at the particular time I met Colby. They were all present in 3 rooms, & I met Colby in one room. When I first met him, asked him for stock, but can't say what particular parties were present at that particular time. That was when I first met Colby. I had been one of the directors of road up to that time; attended that meeting as director. After shaking hands with Colby, I asked if he had brought that stock, as requested, as I desired it. He said he hadn't got it, & afterward went into election. That was all the conversation. Think shortly after that we went into election of directors. There was more said by me to him after that—after election, on same day. When we went into election, paper was passed to me to vote. Looking at Colby, president, I said, it seems I have no stock to vote upon. I didn't vote. After that conversed with him; nothing with reference to this stock. Had further conversation same day. I passed him in leaving room, as he was presiding; said to him, "I shall have to bid you good bye." I stepped in adjoining room; he followed, took me by the

30 hand, & said, "Well, what were you about to say?" I said,

as near as I can recollect, all I have to say is this: "You are a hypocritical, lying, old scoundrel." I said, "You think you have put my hide on the fence; it is only a question of time, when there may be a turn about, & I may have yours where you think you have mine." Colby always declined to deliver stock, giving same reason. I can state, if you wish. In my letter from New York I asked him to bring stock. In railroad office I asked if he had brought it, as I requested. I supposed he would understand, because I requested him from New York to bring stock, & followed that by asking the question. I can tell what he said. When he first understood this stock was to be held by the subscribers, he desired to get up a further subscription. He didn't say in Milwaukee that he wouldn't give me the stock; said he hadn't brought it with him. That ended it. Nothing more said about it. I made a demand in that way. That was at time of meeting; think 30th May. Hadn't commenced suit before that demand. I went up from there to M'r Carpenter's office. After demand, I went to Carpenter's office & asked him to bring suit. I made up my mind to see him (Carpenter) unless he (Colby) did deliver stock on demand I made in Boston. I had made up my mind when he came to Wisconsin he would be sued to get settlement of matters unless he was disposed to come to settlement.

Can't recollect particular day. I consulted with my attorneys on
31 subject. It is possible they may have made some mistake in day.

Colby & I had been in intimate friendly terms some time previous to that, May 30—since December, 1870. To better get at the relations you might submit correspondence between us for 6 months or a year previous.

I would like to submit to you & court & jury correspondence between Colby & myself to show where the difficulty came in & what it was about. Can't give particular dates without reference; were on friendly terms from Dec., 1870, to certain date; I wasn't so angry when I called Colby hypocritical, lying scoundrel, but that I knew what I was talking about; believed it then & believe it still; it was an angry remark, of course; think I was very angry. I must have been angry when I first met him, May 30, & asked if he had brought stock; he said he hadn't; I said I wanted it, but not as angry as afterwards. Didn't fix any amount of stock in demand that day, but merely referred to stock as demanded in Boston, $45,000; that is the amount I demanded in Boston; that is amount set out in complaint. I aver I demanded $45,000 in Milwaukee. Demand in Boston was personal; I had written about it; that was in April; was there prior to writing of letter; think perhaps I can tell the day; was there a number of days near April 20th; was in railroad office, 28 State street; he & I had conversation, & he made some figures; don't know that any one was present; I was
32 asking about the subscriptions.

I propose to give you particular conversation relating to $45,000 stock, if you will let me. I had been there a number of days; had had frequent conversations; were at time speaking of raising funds to go on with road; he said he would have to call, probably, on the subscriptions to raise more money from stockholders, as I understood; asked what terms he was offering them; then referred to a previous transaction; tried to find out what had been done between him & subscribers about this 2,000,000 subscription on their subscription and bonds; then asked if he was going to pay a certain subscription what would be my proportion, what chance I would have in it as one of preferred stockholders; he made some figures; I was about to take the paper & he took it up carelessly; then I says I want that $45,000 stock; he says I

might use it; I says I might hypothecate it to place the subscriptions that was wanted for taking those bonds at a certain figure; he says, "Haven't you got that a little too high, $5,000?" I told him that was amount I claimed, $45,000. He spoke about note of $2,000; asked what interest I would allow him. I told him the interest of Wisconsin was one thing & of Mass. another; if he charged Wisconsin rate, 10%, I should have to charge that on what I claimed from the company. I think he didn't deliver me any stock or offer any; that was about the conversation. Am not aware that Colby said at that time there were
33 some conditions of agreement between us not fulfilled, so that old stock could be delivered to me.

One time he asked me if all the conditions we had entered into had been performed. I said I was not aware of any. He said one of the contracts provides for some conditions that perhaps are not performed. I said I was not aware of it. In the office here he says, "Well, you forget things sometimes, tho' your memory seems very good. I will bet you are mistaken this time." I said, "We will look at contracts." Then he called M'r Spencer to get contracts; they were brought out; Spencer was required to sit down & read them. I said I could read them, it is not necessary to have him read them. Says he, "M'r Colby, you go on," & read three or four contracts. "Well," says he, "I will give it up; it is not there." This was not on which he said his interest was; that was not read. I don't know as to time stock came into hands of Colby; I fixed time in reference to the subscription; subscription list will show terms upon which subscription was made; subscription was dated 18 July, 1870. I was a director of company during this time. Colby notified me that subscriptions were filled in, I think, in October, 1870. Subscription was to be paid in installments, & work commenced in May; installments upon those subscriptions was to be paid in & called by him. Terms of subscription were limited; subscriptions will state, or M'r Colby can tell you the call. Suppose he had the stock in 1871, fall; it was all paid up.

34 Redirect:

I made a demand for the stock before the commencement of this suit; made it because I made it in Boston, & wrote him that I wanted him to bring the stock with him. When I first met him called on him for that stock. Can't be certain as to time of that meeting without memoranda. It was before meeting was actually held that I had this conversation with him. Afterwards went over to see M'r Carpenter about commencing suit.

Q. M'r Reed, you may state to the jury what induced you to use that kind of conversation wherein hard words were used between you and M'r Colby; what led to it; what were the circumstances leading to that conversation. You may begin and state your connection with the road, and so on, through.

(Objected to. Objection overruled. Exception taken.)

A. Well, I have stated that I had made these several demands for the stock; that I had spent a good deal of time and a good deal of money in prosecuting this work, & I thought I had been outrageously treated by M'r Colby, & had been robbed of what was my due. Had been connected with the road from its inception down to that time. I procured the legislation of the different roads that were consolidated into the Wisconsin Central; devoted a good deal of time to organization of & location of road, to preservation of lands, getting the thing in proper shape, & getting up subscription. Was not satisfied
35 with management of road under Philips & Colby Construction

Co. I could not co-operate with them because of the way they had managed road; difficulties they were having with different parties. Did not care so much about being left out of direction as I did of being robbed of what interest I supposed I had in road. I think I have stated that I felt that I was being robbed of my rights by the co. & by Colby. I have no doubt of it. I have certainly not realized anything from it. I think they got things in such hands they thought they could do without me, & so wished to dispose of me. To get at the whole thing, as I said to Judge Dixon, they wanted to ask me the question about what had been the relations between Colby & myself. I would like to submit the correspondence from time we commenced up to time of that conversation.

Recross:

The rights I considered I was being robbed of were rights of stock—the $45,000; & as to other stock & money I claimed was due from the company. I claim that the company does owe me money. I claim quite a balance due me on the settlement; in my opinion there was a large amount. I don't know that the company claim that I owe it considerable. I don't understand that they claim any balance against me. I have paid money into this company; very large amount; could give it by reference to my books; perhaps exact amount. I paid some
36 over $50,000 to those two companies just before their consolidation. I speak of the Manitowoc & Mississippi and Manitowoc & Minnesota. I paid this $50,000 to various parties & to the company for carrying on the work of the road. I have not drawn this money back in my financial transactions with the company.

I invested the $50,000 when I made the arrangement with the defendant that states there are indebtedness of the two corporations in making the arrangements with him. I agreed with M'r Colby to take a certain amount of stock at that time, with certain interest—certain amount of preferred stock & common stock; that I should take and carry with it a certain interest of the road in the land. We had a valuable land grant. I agreed to take so much stock, for instance, and take my chances in the interest. The reason I got angry with Colby was he had been
37 doing things for some time, and his refusing to deliver me that stock and excluding me from the board. M'r Colby ran the machine pretty much.

Redirect:

I was to have a certain amount of preferred stock & common stock to carry with the property of the company. I paid the money for prosecuting these road. When we got up our subscription of stock, and subscription of $2,000,000, and the indebtedness of the company was put into two companies that were to be consolidated afterwards, called it $250,000: $50,000 we give to M'r Philips; $ $150,000 that I represented & M'r Colby & his brother-in-law, called it 50,000, although the whole thing was called 250,000. $50,000 was what I represented. I gave M'r Colby a part of this as a bonus for making his subscription.

Thereupon the plaintiff rested his case.

Defendant's testimony.

The defendant, to maintain the issues upon his part, called as a witness GARDNER COLBY, who being duly sworn, testified as follows:

I am the defendant. Remember the meeting of the board of stockholders on 30 May, 1875, in Milwaukee. I saw plaintiff in room where

meeting was held. We passed the ordinary compliments of the day, and then Judge Reed asked me if I had brought the stock with me, & I told him no. I think that was all that was said. M'r Reed did not, at that time, make any formal demand on me for the stock,
38 and I did not refuse to deliver it. There was more said when we separated, but nothing further about the stock. I remember the conversation between myself & Judge Reed, in the office in Boston, about 20th April. Judge Reed has stated that conversation correctly. He made no demand for stock then. I never refused to deliver to M'r Reed his stock on a demand made for it.

The foregoing is the evidence offered and received on the subject of demand and refusal, and on all the evidence which was given on that subject.

Thereupon, the testimony on both sides being closed, the defendant, in pursuance of the offer for that purpose contained in his answer, by his counsel, moved the court for an order directing and compelling the plaintiff to accept a delivery of the stocks for the non-delivery of which the plaintiff sued in this action, in mitigation of any damages to be recovered by plaintiff herein, and the defendant at the same time, and as part of the same motion, tendered to the plaintiff in open court such certificates of stock, which the plaintiff then and there declined to receive; whereupon defendant, in presence of the plaintiff, and with notice thereof to him, deposited the said certificates of stock with the clerk of this court for the use of said plaintiff; and the said defendant, furthermore, as part of said motion, offered and proposed to pay all costs of said action to be taxed, and all special damages, if any,
39 which the jury might find the plaintiff had sustained.

The court after argument declined to decide said motion until after the jury should have returned their verdict, when the said defendant should be at liberty again to make or renew the same.

Thereupon the defendant by his counsel requested the court, among other things to instruct the jury as follows, to wit:

First. They are conceded facts in this case, facts alleged in the complaint of the plaintiff and admitted by the answer of the defendant, that the defendant is a citizen of the State of Massachusetts and that the plaintiff is a citizen of the State of Wisconsin. It is also a conceded fact in this case—one in like manner alleged and admitted—that the contract for the delivery of the stock in controversy in this action, and to recover damages for the alleged breach of which the action is instituted, was made, executed, and delivered by the defendant to the plaintiff, at the city of Boston, in the State of Massachusetts. Such being the undisputed facts, the contract was a Boston contract, and Boston was the place for the performance of the same, provided the jury shall find that Boston was the place of residence of the plaintiff, or the place where the plaintiff transacted his business. In contracts for the delivery of specific articles of property, goods, or chattels, or choses in action, such as the stocks here in question, the place of residence or of business, according to circumstances, of the party making the
40 contract and agreeing to deliver, is the place for the delivery of such articles, and the party entitled to demand or receive them must demand and receive them at such place, and cannot demand that they be delivered to him at any other place, unless such other place has been expressly named and agreed upon as the place of such delivery. In the absence of any express agreement as to the place of delivery, delivery must be made at the place of residence or of business of the party

required to make it. Demand of the articles to be delivered must also be made at the same place. The plaintiff in this case could not demand of the defendant that he deliver the stocks in question, at Milwaukee, in the State of Wisconsin, unless the fact was that it had been agreed between the plaintiff and the defendant that the stocks should be delivered at Milwaukee, of which agreement, or that any such was ever made, there is no evidence whatever before the court and jury.

Which said request to instruct, the court then and there refused, but modified the same as stated in its general charge, to which refusal and modification the defendant by his counsel in due form of law did except.

Second. The demand of the plaintiff for the delivery of the stocks at Milwaukee, if the jury shall find that any such demand was made, and the refusal of the defendant to deliver them at that place, in case the jury shall find that the defendant did so refuse, constitute no evi-
41 dence of a breach of the contract by the defendant, and will not authorize a finding by the jury for the plaintiff in this action, or an assessment of damages against the defendant for the value of the stocks so refused to be delivered.

Which said request to instruct the said court then and there refused to grant, but modified the same, as stated in the general charge, to which refusal and modification the defendant by his counsel in due form of law excepted.

Third. The complainant alleges a demand and refusal made at Milwaukee alone. The plaintiff is limited in his right of recovery in this action to the facts alleged in his complaint and must recover, if at all, upon those facts. Inasmuch as the facts alleged in the complaint when considered in connection with the fact that there is no proof that Milwaukee was agreed upon between the parties as the place of delivery, show that no sufficient demand and refusal have been alleged and proved, I charge you that you cannot find that there was a demand and refusal in this action such as will justify a recovery of damages herein by the plaintiff against the the defendant.

Which said request was refused by the court, to which refusal the defendant by his counsel did then and there except.

Fourth. It is alleged in the complaint and admitted by the answer, and therefore to be taken as a fact in the case, that by the terms of the contract sued upon, the defendant was to "pay over or deliver upon the order of the plaintiff" the stocks in controversy in this action.
42 The court in'tructs you that a mere verbal request or demand to deliver the stock made by the plaintiff to or upon the defendant was not a compliance on the part of the plaintiff with the terms of the contract, so as to entitle the plaintiff to such delivery. The contract contemplates an order drawn by the plaintiff upon the defendant for the delivery, and not a mere verbal request or demand made by the plaintiff for such delivery. The order intended was a written order to be signed by the plaintiff and addressed to the defendant, and such as when complied with by the defendant would constitute a written voucher or document in the hands of the defendant, evidencing the fact that he had performed the contract on his part by the delivery of the stock as he had undertaken by the contract to do. In this view of the case no sufficient demand and refusal have been proven and the jury must so find.

Which said request the court then and there refused to grant, to which refusal the defendant by his counsel in due form of law excepted.

Fifth. A request to deliver more property than the party is entitled to receive, and a failure or refusal to deliver placed upon that ground,

and so stated and expressed at the time, do not in law constitute a sufficient demand and refusal to sustain an action of this kind. If the jury find that such was the nature of the alleged demand and such the nature of the refusal, then they must find that no demand and refusal have been proved in this action.

Which said request the court then and there refused to grant,
43 to which refusal the defendant by his counsel then and there excepted.

The court, among other things, charged the jury as follows:

The agreement between the parties being, as alleged in the complaint & as admitted on the trial, that the defendant would deliver certain stock upon the order of the plaintiff, it is essential to establish a breach of the contract on the part of the defendant to enable the plaintiff to maintain this action; that it appears that prior to the commencement of the action he demanded of the defendant the delivery of the stock in question, and that the defendant refused to deliver the same.

In cases of this nature demand & refusal are facts to be found by the jury from the evidence.

The jury must determine upon the facts found by them, upon all the evidence touching the situation of the parties and the circumstances by which they were surrounded and the conversations & correspondence had between them, what the parties respectively said, and all being taken into consideration whether there was a demand and refusal.

It is not necessary that such demand should have been formal in its terms, or in any prescribed or particular form. What was required was such a demand, such a form of expression as would communicate
44 to the defendant the knowledge that the plaintiff was then requiring the stock to be delivered to him in pursuance of the contract.

An inquiry simply as to whether the defendant had the stock, or had brought it with him, or the mere expression of a wish that he had the stock unaccompanied with words expressing a requirement that the stock be delivered, would not be sufficient standing in the relation of contracting parties, and the one not bound to do an act until the other exercises his legal right to required it to be done in order to create a default as the basis for proper resort to legal remedy.

Such a demand must have been made, as positively expressed, a requirement of performance. The demand in such case must be a plain & unqualified request for the property. It must not be a mere expression of a purpose to make a demand in future or upon some contingency. It must be absolute and impart an unqualified requirement that the delivery be made.

The request to deliver must have been such, & so made as to have conveyed to the mind of the party of whom it was made the fact that the party making it intended it as a demand. Provided this is done, the particular form of expression or form of demand is not ma-
45 terial.

The terms of the contract set out in the complaint make it, I think, a Boston contract; that is, Boston was the place for the performance, provided that was defendant's residence or the place where he transacted his business.

It is necessary, therefore, that you should be satisfied that the plaintiff demanded the stock in question at the place for the performance of the contract by defendant. If the defendant resided in Boston, or if

that was the place where he transacted his business, that was the place for the plaintiff to make his demand, and the demand made in Milwaukee would be ineffectual as the basis for an action, unless it had been agreed between the plaintiff & the defendant that the stock should be delivered in Milwaukee. But the interview between the parties in Milwaukee & the conversation that there passed between them concerning this stock may be considered by you, in connection with the alleged previous interview & conversation in Boston for the purpose of aiding you, if necessary, in determining whether there was a demand for the stock in Boston. I give you, with slight modifications, the instructions asked by the plaintiff on this subject.

The testimony on the subject of demand by the plaintiff upon
46 a day in April, 1875, and in New York by letter, & in Milwaukee on the 27 of May, 1875, may all be taken into consideration in determining whether a demand was made before the commencement of this action, at the place for performance of the contract by defendant.

(To the giving of which said instruction the defendant, by his said counsel, did then and object and except.)

The demand for the stock might be in writing or verbal. It was not essential that it be in writing.

(To the giving of which said instructions the defendant, by his counsel, did then and there object & except.)

There must also have been a refusal to deliver the stock by the defendant; such a refusal to constitute a breach of the contract, so as to enable the plaintiff to bring an action for non-fulfillment, must also be absolute. If, however, a refusal is qualified by a condition, which the party refusing has no right to impose, the plaintiff's right to bring an action would result as effectual as if the refusal were unconditional. A refusal in such a case as this must be absolute in the sense of amounting to a denial of the plaintiff's right & not a mere excuse or apology for not delivering property at present.

In case of failure to deliver, it must be considered as an inten-
47 tion to withhold the property from the possession of the party entitled to it, and to assume the dominion and control over it against the known wishes and will of such party. But the refusal need not be expressed. It may be inferred from non-compliance with a proper demand.

If a demand is immediate and distinct, a silent retention of the property demanded will be sufficient, though if the property remains in the possession of the party of whom the request is made, with the assent or permission of the party making the request, the retention of it under such circumstances would not amount to a refusal to deliver which would justify an action for the recovery of the value of the property.

It has been argued that even an absolute refusal is not always evidence of a breach of contract or conversion of property. This is true as where the possessor of property refuses to deliver it up until some ownership is shown in the claimant, or until some other condition lawfully imposed by him is complied with. If an owner of property has coupled his demand with a claim that it be returned to him in a certain condition, in the way of repairs, which the other party in good faith denies his liability to make, a refusal is not evidence of a denial
48 of the owner's title or right. I mention these as illustrating instances.

I do not, however, think that where a party demands more than he is entitled to, that circumstance alone will justify the other party in refusing to deliver that part of the property to which the party making

the demand is entitled; provided it is distinct, well known, and clearly distinguishable from that to which it is claimed the demanding party is not entitled.

(To the giving of which said instruction the defendant, by his counsel, did then and there object and except.)

In other words, if the plaintiff in this case demanded, by such proper demand as I have shown to be necessary, $45,000 of the stock, and he was clearly entitled to $32,000 & no more, the defendant could not refuse to deliver the $32,000 of stock on the ground that the demand was excessive.

(To the which said instruction the defendant, by his counsel, did then and there object and except.)

Under such circumstances I think it would be the duty of the defendant on such demand to offer delivery of such amount of stock as the plaintiff might confessedly be entitled to.

(To which said instruction defendant did object and except.)

49 Guided by the rules I have thus stated, you should look into the testimony to determine whether there was a demand made by the plaintiff upon the defendant before the commencement of this action for a delivery to him of this stock, & the refusal to deliver.

(To which instruction defendant, by his counsel, did then and there object and except.)

An issue is here directly made, and the question is of serious importance. The evidence on this branch of the case is confined to the testimony of the plaintiff and defendant. I submit to you certain questions to which your answers are desired.

First. Did the plaintiff before the commencement of this action demand of the defendant the stock in question?

Second. If the plaintiff did before the commencement of this action demand from the defendant the stock in question, did the defendant refuse to deliver the same?

Third. Did the plaintiff and defendant enter into the agreement of May 16, 1871, set forth in the answer, by which the former was to release to the defendant the excess above $40,000 of the stock originally subscribed for the plaintiff, in the event it should become necessary to subscribe an additional $100,000 to the stock of the railroad com-

50 pany; if so, did the defendant in good faith judge & determine it to be necessary for him so to subscribe, and did he so subscribe & pay for such additional stock in pursuance of such agreement?

4th. If such agreement was entered into, and if in the judgment of defendant it became necessary for the defendant to subscribe an additional $100,000 to said stock, and if he did subscribe and pay for the same, did the defendant give the plaintiff the 30 days' notice mentioned in the agreement; and, if not, was such notice waived by the plaintiff?

Fifth. If the plaintiff demanded from the defendant the stock in question, what amount of stock at its face, if any, was the plaintiff then entitled to demand & receive?

Sixth. What was the cash value of the stock to which you find the plaintiff entitled, if any, on the 27th day of May, 1875?

Seventh. Has there been any change in the value of said stock; and, if so, what, from that day down to the time of the rendition of your verdict?

Thereupon, after deliberating, the jury returned the following verdict into court:

First. Did the plaintiff before the commencement of this action demand from the defendant the stock in question?

51 Answer. We find there was a demand.

Second. If the plaintiff did, before the commencement of this action, demand from the defendant the stock in question, did the defendant refuse to deliver the same?

Answer. He did.

Third. Did the plaintiff and defendant enter into the agreement of May 16, 1871, set forth in the answer, by which the former was to release to the defendant the excess above $40,000 of the stock originally subscribed for the plaintiff in the event it should become necessary to subscribe an additional $100,000 to the stock of the railroad company; if so, did the defendant, in good faith, judge and determine it to be necessary for him so to subscribe, and did he so subscribe and pay for such additional stock in pursuance of such agreement?

Answer. We answer the above question in the affirmative.

Fourth. If such agreement was entered into, and if in the judgment of defendant it became necessary for the defendant to subscribe an additional $100,000 to said stock, and if he did subscribe and pay for the same, did the defendant give the plaintiff the 30 days' notice mentioned in the agreement; and, if not, was such notice waived by the plaintiff?

Answer. Notice was waived.

Fifth. If the plaintiff demanded from the defendant the stock in question, what amount of stock at its face, if any, was the plaint-

52 iff then entitled to demand and receive?

Answer. Thirty-two thousand dollars.

Sixth. What was the cash value of the stock to which you find the plaintiff entitled, if any, on or about the 27th day of May, 1875?

Answer. Nine thousand and six hundred dollars.

Seventh. Has there been any change in the value of said stock; and if so what, from that day down to the time of the rendition of your verdict?

Answer. No change.

S. M. BILLINGS,
Foreman.

And now, at this same term, and after verdict and before judgment, came the said defendant, by his counsel, and renewed the said motion to require the plaintiff to accept said stocks, whereupon the same was overruled by the court; to which said ruling the said defendant did then and there in due form of law except.

And the said defendant did also move at the same time for a new trial of said action, because the verdict was against law and against the evidence, and because the court erred in its instructions to the jury and because the damages were excessive; which said motion was denied, and to which said ruling and decision the said defendant did then & there in due of form of law object and except.

53 And thereupon the said plaintiff moved for judgment on such special verdict, and asked interest on the value of said stocks as found by the jury from May 27, 1875, to the day of the rendition of said judgment.

(Defendant, by his counsel, objected to judgment for interest.)

The court overruled said objection and rendered judgment for the value of said stocks and for interest thereon, as demanded by plaintiff.

(To which ruling and decision of the court defendant, by his counsel, then and there in due form of law objected and excepted.

And because said several matters, rulings, and decisions, &c., do not appear of record, the judge of said court, at the request of the defendant's counsel, has hereunto set his hand and seal to this bill of exceptions during the term aforesaid, to wit, this sixth day of July, A. D. 1876.

[SEAL.] CHA'S E. DYER,
Judge.

54 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of George Reed against Gardner Colby.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 15th day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 101st.

[SEAL.] EDWARD KURTZ,
Clerk.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America, for the eastern district of Wisconsin, before you, between George Reed, plaintiff, and Gardner Colby, defendant, a manifest error hath happened, to the great damage of the said Gardner Colby, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this first day of May, in the year of

our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 100th.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court Eastern Dist. of Wisconsin.

56 THE UNITED STATES OF AMERICA, *ss:*

To George Reed, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein Gardner Colby is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles E. Dyer, district judge of the United States for said district, at the city of Milwaukee, this first day of May, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the 100th.

[SEAL.] CHA'S E. DYER, *Judge.*

We admit service of above citation this 15th day of September, A. D. 1876.

GEORGE B. GOODWIN &
JOHN I. THOMPSON,
Attorneys for George Reed.

(Indorsement on cover:) No. 243. Gardner Colby, plaintiff in error, vs. George Reed. E. Wisconsin C. C. U. S. Filed 14th October, 1876.

Supreme Court of the United States

OCTOBER TERM, 1878.

No. 243.

GARDNER COLBY, Plaintiff in Error,

vs.

GEORGE REED, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF OF EDWIN H. ABBOT, FOR THE PLAINTIFF IN ERROR.

Thomas McGill & Co., Law Printers, Washington, D. C.

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GARDNER COLBY, PLAINTIFF IN ERROR, *vs.* GEORGE REED, DEFENDANT IN ERROR.	In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

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STATEMENT OF THE CASE.

1. The parties to this action were, in 1870, interested together in the construction of a land-grant railroad in Wisconsin.

On December 3, 1870, at Boston, in Massachusetts, Colby agreed with Reed, in writing, under seal, that he would subscribe and pay $200,000 upon the stock-subscription of the railroad, and that he would "*pay over or deliver upon the order of*" Reed $45,000 of the proceeds of this subscription. Colby afterwards paid this $200,000 in money, and received the certificates of stock which represented the subscription.

Subsequently more money was needed to build the road, and an additional $100,000 had to be subscribed by Reed and Colby. Reed could not furnish his proportion; and on May 16, 1871, Colby agreed, in consideration of receiving $5,000 out of Reed's stock, to pay the whole additional

subscription for both, and take the new stock himself. This reduced Reed's stock in Colby's hands to $40,000.

On the same day (May 16, 1871) Reed also borrowed of Colby $2,000 in money for six months, on pledge of $8,000 of Reed's stock in Colby's hands. This money never has been repaid, and the transaction left in Colby's possession, and subject "to the order of" Reed, the amount of $32,000 stock, *and no more*.

2. Amicable relations between the parties were not broken off until May 27, 1875, when, at the annual meeting of the stockholders of the railroad in Milwaukee, Reed failed to be re-elected upon the board of directors. Reed, when the vote was announced, became very angry, and left the meeting, addressing to Colby (who was presiding) violent and abusive language as he passed. He went immediately to a lawyer's office, and began an action against Colby, in which he laid his damages at the sum of $300,000, and which finally resulted in the judgment at bar. The summons was dated and served on the day of the annual meeting. Reed testified that Colby and he had been on intimate, friendly terms ever since December, 1870, and up to this time.

3. When the complaint was filed on June 28, 1875, Reed had reduced his claim for damages to $45,000, being, as he alleged, the value of his stock in Colby's possession. He sought to recover damages for an alleged failure on Colby's part to deliver to him his stock upon a demand said to have been made in Milwaukee at the annual meeting on May 27, 1875.

4. It is to be observed that this action is not trover. No conversion of the stock by Colby, whether actual or constructive, is alleged or attempted to be proved. No misappropriation of the stock by Colby to his own use, and no

tort, or conduct in any manner approaching or resembling tort, is charged upon Colby. The action rests wholly in contract, and its maintenance depends upon the question whether a proper and sufficient demand for the stock was made before action brought. Moreover, no special damages resulting to Reed out of the non-delivery of the stock prior to the suit, were alleged or proved, or attempted to be proved; and the jury found specially that there was no change in its value between the time of the alleged demand and the rendering of their verdict.

5. The only substantial issues of fact which need be regarded now, were—

First. Whether Reed was entitled to $45,000 stock, as he claimed, or to only $32,000 stock, as Colby admitted. Upon this issue the jury found specially that Reed was entitled to the $32,000 stock only.

Second. Whether Reed had made, before he brought suit, any sufficient and proper demand for this $32,000.

The jury found specially, under instructions excepted to, and in response to a question framed by the court, that, before the commencement of the action, Reed had demanded, and Colby had refused to deliver, "the stock in question."

The whole evidence offered and received on the subject of demand and refusal is set forth in the record. Reed's complaint claims $45,000. His testimony shows that he never claimed or would accept any less sum; and the finding of a demand for the "stock in question" is a finding of a demand for "$45,000 stock."

There is no proof or finding of any other demand by Reed for, or refusal by Colby to deliver, the $32,000 stock to which Reed was entitled.

Third. The value of the $32,000 stock at time of the alleged demand for the $45,000, and at the verdict.

The jury found this value to be $9,600 at each date.

These issues were all specially found by the jury in answer to questions put by the court. No general verdict was rendered, and judgment was entered by the court, as upon a case stated, upon the answers of jury to the questions of the court.

The counter-claim of Colby for the $2,000 loan and interest was not contested at the trial.

6. Colby had admitted in his answer that Reed was entitled to receive $32,000 stock, and had averred that he was and ever had been willing and ready to deliver that amount to Reed, whenever Reed would accept it.

At the trial, after the testimony on both sides was closed, Colby, in pursuance of the offer and admission contained in his answer, tendered to Reed in open court the $32,000 stock and certificates therefor, and offered and proposed to pay all the costs of said action, to be taxed, and all special damages, if any, which the jury should find Reed entitled to recover. Reed refused to accept the tender and offer. Colby then, in Reed's presence and with notice to him, deposited the certificates with the clerk of the court for Reed's use, and moved the court for an order directing and compelling Reed to accept a delivery of the stock in mitigation of any damages to be recovered by Reed in the action.

The court declined to decide this motion until after the jury had rendered their verdict; but subsequently denied it, and entered a money-judgment for Reed for the value of the $32,000 stock on May 27, 1875..... $9,600
with interest from that date..... 588

making in all a judgment for..... $10,188
against which this writ of error runs; and also entered a judgment for Colby on the counter-claim in the sum of $2,546.88, and, deducting this sum from Reed's judgment,

ordered execution to issue for Reed in the sum of $7,641 72
and costs..... 49 82

making a judgment, on April 12, 1876, of..... $7,691 54
in favor of Reed, against which also this writ of error runs.

Assignment of Errors.

The plaintiff assigns the following errors in the record and proceedings and rendition of the judgment for Reed, to wit:

First. The contract on which plaintiff below sued was in writing and under seal, and bound defendant below "to pay over or deliver upon the order of said plaintiff" the $32,000 stock.

The defendant requested the court to instruct the jury "that a mere verbal request or demand to deliver the stock, made by the plaintiff to or upon the defendant, was not a compliance on the part of the plaintiff with the terms of the contract, so as to entitle the plaintiff to such delivery. The contract contemplates an order drawn by the plaintiff upon the defendant for the delivery, and not a mere verbal request or demand made by the plaintiff for such delivery. The order intended was a written order to be signed by the plaintiff and addressed to the defendant, and such as when complied with by the defendant would constitute a written voucher or document in the hands of the defendant, evidencing the fact that he had performed the contract on his part, by the delivery of the stock as he had undertaken by the contract to do. In this view of the case no sufficient demand and refusal have been proven, and the jury must so find." (Folio 42.)

The court refused to give this instruction, and charged: "The demand for the stock might be in writing or verbal. It was not essential that it be in writing." (Folio 46.)

SECOND. The contract was a Boston contract, to be performed in Boston, and the court so instructed the jury. (Folio 45.) The defendant asked but the court refused the following instruction to the jury: "The complainant alleges a demand and refusal made at Milwaukee alone. The plaintiff is limited in his right of recovery in this action to the facts alleged in his complaint, and must recover, if at all, upon those facts. Inasmuch as the facts alleged in the complaint, when considered in connection with the fact that there is no proof that Milwaukee was agreed upon between the parties as the place of delivery, show that no sufficient demand and refusal have been alleged and proved, I charge you that you cannot find that there was a demand and refusal in this action such as will justify a recovery of damages herein by the plaintiff against the defendant." (Folio 41.)

The court instructed the jury on this subject as follows: "It is necessary, therefore, that you should be satisfied that the plaintiff demanded the stock in question at the place for the performance of the contract by defendant. If the defendant resided in Boston, or if that was the place where he transacted his business, that was the place for the plaintiff to make his demand, and the demand made in Milwaukee would be ineffectual as the basis for an action, unless it had been agreed between the plaintiff and the defendant that the stock should be delivered in Milwaukee. But the interview between the parties in Milwaukee, and the conversation that there passed between them concerning this stock, may be considered by you in connection with the alleged previous interview and conversation in Boston for the purpose of aiding you, if necessary, in determining whether there was a demand for the stock in Boston. I give you, with slight modifications, the instructions asked by the plaintiff on this subject. The testimony on the subject of demand by the plaintiff upon a day in April, 1875, and in New York by letter, and in Milwaukee

on the 27th of May, 1875, may all be taken into consideration in determining whether a demand was made, before the commencement of this action, at the place for performance of the contract by defendant." (Folios 45, 46.)

THIRD. The evidence shows that Reed never demanded anything but $45,000 stock, and never was willing to accept less, but claimed that amount in this action, and went to the jury upon the validity of his claim. The evidence also shows that Colby never was asked, and never refused to deliver, the real amount due, (*i. e.*, the $32,000,) but objected to the demand which Reed made, because it was too large.

The defendant asked the court to instruct the jury: "A request to deliver more property than the party is entitled to receive, and a failure or refusal to deliver placed upon that ground, and so stated and expressed at the time, do not in law constitute a sufficient demand and refusal to sustain an action of this kind. If the jury find that such was the nature of the alleged demand, and such the nature of the refusal, then they must find that no demand and refusal have been proved in this action." (Folio 42.)

The court declined to give this instruction, but charged the jury: "I do not, however, think that where a party demands more than he is entitled to, that circumstance alone will justify the other party in refusing to deliver that part of the property to which the party making the demand is entitled, provided it is distinct, well known, and clearly distinguishable from that to which it is claimed the demanding party is not entitled. [*Exception.*] In other words, if the plaintiff in this case demanded, by such proper demand as I have shown to be necessary, $45,000 of the stock, and he was clearly entitled to $32,000, and no more, the defendant could not refuse to deliver the $32,000 of stock on the ground that the demand was excessive. [*Exception.*] Under such circumstances, I think it would be the duty of the defendant on such demand to offer

delivery of such amount of stock as the plaintiff might confessedly be entitled to. [*Exception.*] Guided by the rules I have thus stated, you should look into the testimony to determine whether there was a demand made by the plaintiff upon the defendant before the commencement of this action for a delivery to him of this stock, and the refusal to deliver." [*Exception.*] (Folios 48, 49.)

FOURTH. The court erred in permitting the plaintiff, in redirect examination, to "begin and state his connection with the road, and so on, through," and to "state to the jury what induced you [him] to use that kind of conversation wherein hard words were used between you [him] and Mr. Colby; what led to it; what were the circumstances leading to that conversation." (Folios 34, 35, 36, 37.)

FIFTH. The court erred in denying, after verdict and before judgment, the motion of the defendant to require the plaintiff to accept the $32,000 stock, tendered by defendant to plaintiff in open court, in reduction of damages. (Folios 20, 38, 39, 52.)

SIXTH. The court erred in entering judgment for Reed for the full value of the stock in money, and in not applying the stock, deposited in court for the use of the plaintiff, in mitigation of damages at its value as fixed by the jury; and in giving the plaintiff judgment for more than nominal damages and costs upon the principal claim; and in not entering judgment and ordering execution for the defendant in the amount of his counter-claim, less the amount of nominal damages and costs in the principal action.

SEVENTH. The court erred in allowing interest upon the value of the $32,000 stock from May 27, 1875, to the day of the rendition of the judgment, April 12, 1876, and including the same in the judgment.

BRIEF OF THE ARGUMENT.

FIRST POINT.

The contract set up in the complaint bound Reed to accept the stock when tendered by Colby, whether in or out of court. Colby's right to deliver was as perfect as Reed's right to damages for a non-delivery. Reed's suit did not abrogate this contract, but merely sought damages for its non-performance. Reed was entitled to compensation for any loss which the detention of the stock had caused him; and the measure of his damages was, prima facie, the value of the stock, since no special damages were alleged or proved. But Colby, so long as the contract was in force, was entitled to mitigate those damages by delivery, and Reed was as much bound by the contract to accept the stock when tendered, as Colby was bound to deliver it upon Reed's order. When, therefore, Colby tendered the stock in court, the contract obliged Reed to receive it *in specie*, and Reed's claim for damages under his contract was at once reduced by the value of the stock. Since the jury found that this value had not changed between the time of the alleged demand and the rendering of the verdict, judgment should have been given for merely nominal damages and the costs of the action; and the judgment entered is erroneous, because it is not in accordance with the contract between the parties.

1. Reed's action is not trover, but special assumpsit for damages arising out of an alleged breach of contract. It sounds in contract, not tort; and its real nature is to be regarded in determining the question of Reed's right to refuse to accept the stock when tendered, and the duty of the court to require Reed to accept the tender in mitigation of damages.

"Although the Code of Procedure has abolished the distinctions between forms of action, yet the intrinsic differ-

ence between actions in their nature remains; and the principles by which the different forms of action were previously governed, still remain and control in determining the rights of parties."

1 Chitty on Pleadings, [Perkins' Ed., 16th,] IV.
Goulet *v.* Asseler, 22 N. Y., 225, 228.

"The mere formal differences," says Mr. Justice Selden, "between such actions are abolished. The substantial differences remain as before."

Parsley *v.* Nicholson, 65 N. Car., 207, 210.
Cooper *v.* Landon, 102 Mass., 58, 60.
Lubert *v.* Chavitcan, 3 Cal., 458.
Kewaunee Co. *v.* Decker, 30 Wis., 624.
Maguire *v.* Tyler, 47 Mo., 115.

In practice under the code of Wisconsin, which is substantially the old code of New York, the courts have repeatedly declared that "the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be. (*Howland* v. *Needham*, 10 Wis., 495, 498.) These distinctions continuing, they must be regarded by the courts now as formerly; and now, no more than then, (except under the peculiar circumstances above noted,) can any one complaint or count be made to subserve the purposes of two distinct and dissimilar causes of action at the option of the party presenting it. It cannot be 'fish, flesh, or fowl' according to the appetite of the attorney preparing the dish set before the court. If counsel disagree as to the nature of the action or purpose of the pleading, it is the province of the court to settle the dispute. It is a question, when properly raised, which cannot be left in doubt; and the court must determine with precision and certainty, *upon inspection of the pleading*, to what class of actions it belongs or was intended, whether of tort, upon contract, or in equity;

and if necessary or material, even the exact kind of it within the class must also be determined. (See *Clark* v. *Langworthy*, 12 Wis., 441, and *Gillett* v. *Fraganza*, 13 Wis., 472.) This is not only in harmony with the decisions above referred to, but with all the decisions of this court bearing upon the question, and we know of none elsewhere in conflict."

Supervisors of Kewaunee County *v.* Decker, 30 Wis., 624, 629, 630.

Upon these principles the Supreme Court of Wisconsin reversed a judgment which had been entered on an action *ex delicto* for conversion of personal property, where the evidence showed only proof of liability *ex contractu*, because of the substantial difference between the action for wrongful conversion and the action for money had and received.

Anderson *v.* Case, 28 Wis., 505.

And whenever the question is in any aspect important, the court must ascertain and decide definitely what the character of the pleading is, and the nature of the cause of action stated in it or intended to be.

Lee *v.* Simpson, 29 Wis., 332.

Ragan *v.* Simpson, 27 Wis., 355.

It is expressly decided, that not only the sufficiency of the pleading, "but also the true nature and object of it, or what the particular kind or cause of action stated is, or is designed to be," must be determined on demurrer to it; "and that for this purpose *the character of the summons* may be taken into consideration *in connection with the form of the allegations of the complaint.*" (P. 632.)

Supervisors of Kewaunee County *v.* Decker, *supra.*

Samuels *v.* Blanchard, 25 Wis., 329.

In the present action, the summons is not for relief, but

is for a money demand. This summons is appropriate only in cases arising on contract. "It corroborates the intention of the pleader, as shown by the allegations of the complaint, to sue in that form of action." From both summons and complaint it clearly appears that the present action is, and was designed to be, in contract, and not in tort. There is no allegation of wrongful act or intent anywhere made. "By this standard, or by the rules of pleading which should govern in an action for the wrongful conversion of the moneys, must the sufficiency of the averments be tested."

Supervisors of Kewaunee Co. *v.* Decker, *supra*, 633.

But by the rules of the common law, in actions of trover a wrongful detention must be alleged, and proved, and found by the jury. "The conversion is the gist of this action. . . . . It is a presumption in law and fact, and, if the jury simply find the fact of a demand and refusal, the court cannot infer a conversion." This proof is always necessary where the goods came lawfully into the defendant's possession, as by a finding, or upon a bailment, or delivery by the owner.

2 Chitty on Pl., 619. [Perkins' Ed., 1876.] 2.

"The demand and refusal do not necessarily amount to a conversion, but are only *prima-facie evidence* of it; and therefore a finding by special verdict that the plaintiff demanded the goods and the defendant refused them, will not warrant the court in considering that there was a conversion; and if it be apparent that there really was no conversion, ... the demand and refusal are inoperative."

1 Chitty on Pl., 177*.

"As conversion is the gist of the action, it must necessarily be stated in the declaration."

Ib., 181.

Demand and refusal "is but evidence [of conversion]; and if it be found by special verdict in such case that the plaintiff requested them of the defendant, and he refused, it is not a matter upon which the court can judge any conversion."

Chancellor of Oxford *v.* Bishop of Coventry, 10 Coke Rep., *57*a*.

In Mires *v.* Solebay, 2 Mod., 242, [29 Car., 2, 1678,] a special verdict found a demand by plaintiff and refusal by defendant; but the whole court held that the action would not lie against the defendant: "*Fourthly.* Because it is not found that the servant did convert the sheep to his own use; for the special verdict only finds the demand and the refusal, which is no conversion; and though it is an evidence of it to a jury, yet it is not matter upon which the court can give judgment of a conversion (10 Co., 57); and therefore the jury should have found the conversion as well as the demand and refusal. . . . The finding of the demand and refusal was only a presumptive, not a conclusive proof of the conversion, and if the jury themselves know that there was no conversion, yet the plaintiff hath failed in his case." . . . And the court said "they would not intend a conversion, unless the jury had found it. . . . Whereupon a *venire facias de novo* was prayed to help the insufficiency of the verdict, the conversion not being found; but the court said it was to no purpose to grant a new trial unless the plaintiff had a new case. And so judgment was given for the defendant."

"A demand and refusal is only evidence of a conversion; and, therefore, if the jury find a special verdict that there was a demand and refusal, the court cannot adjudge it a conversion."

Buller's Nisi Prius, (6th ed.,) 44. [1796.]

And where the evidence shows a reasonable qualification, the refusal is not evidence of a conversion.

Alexander *v.* Southey, 5 Barn. & Ald., 247.

And, under the Code, a conversion must no less be charged in the pleadings, and the proofs must establish that the act was wrongful or unlawful.

1 Abbott's Forms, 456.

Decker *v.* Matthews, 12 N. Y., 313.

Buck *v.* Colbath, 7 Minn., 310.

2. The summons, the complaint, and the testimony show that no element of tort entered into this action. The jury were asked to pass upon the issue of demand and refusal, but no question as to conversion was submitted. The plaintiff's refusal to accept the stock *when tendered under the contract*, is not excused by any show of wrong-doing on the part of the defendant in the premises.

3. Colby was a bailee without hire, a simple depositary of this stock. It had come rightfully into his hands as a part of that stock which he had bought and paid for with his own money, under an agreement that a portion of it should be subject to Reed's order. The stock lay in Colby's hands awaiting that "order." The precise amount of Reed's portion of the subscription was unsettled between the parties, and the true proportion was never admitted by Reed until the jury fixed it. Up to the moment when this suit was brought, Colby's right to deliver the stock is unquestioned. How did the beginning of this action deprive Colby of the right to tender the stock with indemnity, and reduce the damages to a minimum ? That, under these circumstances, the bringing of this suit by Reed, in a passion, ended Colby's right to deliver under his contract, and gave Reed the right to compel Colby to pay him its full value in

money, seems too plain a fallacy to discuss. Yet unless this proposition is sound, the judgment at bar is erroneous.

SECOND POINT.

But, even if the action were trover, the right of the defendant to mitigate damages by return of the property *in specie*, where the defendant's possession was without willful wrong on his part, and the property remained entirely in statu quo, was established at common law before the Revolution; and is therefore adopted in this court.

I. The disuse of the action of detinue pressed the common law courts to mould the action of trover into a means of enforcing specific delivery of the article converted, and at the same time to allow defendants to mitigate damages by delivery, under certain limitations. This power of common law courts was fully asserted by Lord Mansfield in Fisher *v.* Prince, 3 Burr., 1363 [1762].

"Upon showing cause by the plaintiff's counsel 'why, upon delivering to the plaintiff the several goods and chattels for which this action (which was an action of trover) was brought, and paying him his costs to the day of making the motion, further proceedings should not be stayed,' (which rule to show cause had been obtained upon a motion made by the counsel for defendants,)" Lord Mansfield and Mr. Justice Wilmot laid down the following rule: "Where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages, there the specific thing demanded may be brought into court. (And Mr. Justice Wilmot said this was the more reasonable, as this action of trover comes in the place of the old action of detinue.) Where there is an uncertainty, either as to the quantity or quality

of the thing demanded, or there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall not be brought in. * * * The reason holds to every other case where a thing clearly remains of the same value; yet the jury may give damages for the detention. I remember its being done twice or thrice in things of small value. It ought to be done to prevent vexatious litigations which a plaintiff may be tempted to pursue when in all events he is sure of costs. It ought to be done, because it is the specific relief. It ought to be done, because at the trial, when the thing remains in the same condition, there generally is a rule 'to deliver it.' An estimated value is a precarious measure of justice compared with the specific thing. I am aware of the cases where a laced head, a gold watch, a diamond ring, and Chinese pictures were refused to be brought in. But, as I think, 'such motions ought neither to be refused or granted of course,' they must depend upon their own circumstances. No injury is done the plaintiff if the court should think 'he ought not to proceed for damages beyond the specific thing,' because he can still proceed for more at the peril of costs; and so he ought."

In Cook *v.* Holgate, Barnes' Cases, 281, [C. P., 1736,] the defendant in trover moved for leave to bring the goods specified in the declaration into court; but the goods being ponderous, the court below denied the motion. But the Common Pleas ordered the plaintiff to show cause why he should not consent to accept the goods and costs.

The same rule was applied to like cases of trespass.

In Pickering *v.* Truste, 7 Term Rep., 49 [1796], the defendants had seized fourteen hides of leather, and been sued in trespass. Finding they could not justify, they offered to pay the value and costs, which plaintiff refused to ac-

cept. Defendants then obtained a rule upon plaintiff to show cause why proceedings should not be stayed on defendants undertaking to restore the leather or pay its value with costs of suit. Erskine showed cause for plaintiff on ground, among others, that "the plaintiff never consented to take the sum proposed, and that this application could not be granted without his consent." But the court made the rule absolute.

Lord Kenyon, Ch. J. (Stopping Gibbs, the Recorder, the Common Sergeant, and Dampier in support of the rule.) "Formerly, such an application as the present would not have been successful. The court, in answer to an application to bring goods into court, used to say they had no warehouse for such a purpose; and the rule was confined to the instance of bringing money into court. But of late years it has been usual to grant such applications as this when a fit case has been brought before the court for that purpose. And this appears to be such a case; the officers, in seizing the goods in question, made a mistake, but no damage whatever to the plaintiff is suggested, and there seems to be no pretense to seek for vindictive damages. And as the defendants have offered to make every compensation which justice requires, I think we ought to make this rule absolute."

Coombe *v.* Sansom, 1 Dowl. & Ry., 201 [1822], was a rule to show cause why, upon giving up title deeds and payment of costs, satisfaction should not be entered upon record of a judgment recovered in trover against plaintiff for their conversion. The court said: "A court of equity would certainly relieve the defendant against the damages recovered in trover on a full indemnity to the plaintiff. The defendant came to the court in mercy in order to relieve himself from the payment of a large sum of money, and it was but reasonable that he should submit to the terms suggested by the plaintiff's counsel," *i. e.*, putting plaintiff in as good position as if the deeds had been delivered without suit; and the rule was made absolute.

In Earle *v.* Holderness, 4 Bing., 462 [1828], a defendant in trover, for a packet of letters, was allowed to stay proceedings as to one of them by delivery after action brought, and paying costs of the application; and if plaintiff would accept that letter with full costs of the action, the action was to be stayed; but if not, then plaintiff was to proceed under peril of paying costs if he should not afterwards recover more than nominal damages on residue of his claim.

The same principle was also applied in replevin, where the defendant had avowed for rent in arrear, and the plaintiff was allowed to bring into court the rent specified in the avowry, and, on payment of costs, all further proceedings were stayed.

Vernon *v.* Wynne, 1 H. Bl., 24 [1788].

In Evans *v.* Kymer, 1 B. & Ad., 528, [1830,] trover was brought for a bill of exchange. Verdict was rendered for the amount of the bill. But, on argument of a rule *nisi* for nonsuit, Lord Chief Justice Tenterden said: "A difficulty has been raised as to the damages to be recovered in this form of action. The ancient mode of proceeding, in such a case as the present, would have been to bring detinue, in which form of action the specific chattel is recovered, whereas in trover the specific chattel is not recovered, but the value is recovered in damages for the detention. The jury here were directed to find the value of the bill in case they found their verdict for the plaintiff. *If the defendants deliver up the bill, nominal damages may be entered on the record.*"

The same rule was applied by Patteson, J., in Cooke *v.* Hartle, 8 Car. & P., 568, [1838,] and damages restricted to what tools were actually converted.

In Alsager *v.* Close, 10 M. & W., 576, 584, [1842,] the defendant, having possession of a bond and a bill of ex-

change for £1,600, which belonged to plaintiff as assignee, cancelled the bond; and negotiated the bill for £800. He was sued in trover, and a verdict was entered against him for £1,600. But Chief Baron Abinger said as to the amount of damages: "If the defendant will bring £800 into court and deliver up the bill, the verdict may be entered for a nominal sum; but he converted the whole bill, and the plaintiffs are entitled to recover the value of the whole at the time of conversion. The defendant cannot be less liable for having destroyed the property to the amount of one-half."

By 17 and 18 Vict., c. 125, s. 78 [1854], the court is empowered, on application of plaintiff, in any action for detention of chattel, to order the issue of an execution for its return in specie without giving defendant the option of retaining it upon paying the assessed value, and to enforce return in specie by distress on defendant's lands and chattels.

The discretion of the court in making such an order is subject to review.

Chilton *v.* Carrington, 15 C. B., 730 [1855].

In Brunsden *v.* Austin, Tidd's Pr., 571, a defendant in trover was allowed to surrender part of a steam engine which he admitted plaintiff was entitle to receive.

"A mere non-delivery of goods which have been placed in the defendant's hands for a specific purpose will not amount to a tortious conversion." * * * "The proper remedy is an action of assumpsit for non-performance of the contract."

Selwyn's Nisi Prius, 1392.

Ellenborough, Ch. J., in Severin *v.* Keppel, 4 Esp., 157.

And return of property, after refusal but before action brought for conversion, defeats action for conversion.

Hayward *v.* Seaward, 1 Moo. & S., 459 [1832].

And so, after action, if accepted, the return bars everything but special damages.

Moon *v.* Raphael, 2 Bing. N. C., 310 [1835].

Wellington *v.* Wentworth, 8 Met., 548.

And if the property goes to the plaintiff's use or benefit, *e. g.*, by attachment for his debt, this involuntary application mitigates the damage to the same extent as a return.

Kaley *v.* Shed, 10 Met., 317.

The rule in Fisher *v.* Prince is adopted in Massachusetts, and the case is considered and approved by Mr. Justice Wilde.

Atkins *v.* Chilson, 11 Met., 112, 118.

Lucas *v.* Trumbull, 15 Gray, 306.

In Vermont, the principle has been several times adopted, and the practice fully discussed and applied.

Hart *v.* Skinner, 16 Vt., 138, [1844,] was trover for an omnibus. Defendant had hired it for one purpose, but had used it for another service, and injured it. Defendant repaired it, and tendered, after action brought, the carriage and $15 as satisfaction for damages and costs, which plaintiff refused to accept. Verdict was given for the value of the carriage, and the defendant excepted. The judgment was affirmed on account of circumstances of case, but the court apply to it the doctrine of *Fisher* v. *Prince*, and adopt fully Lord Mansfield's reasoning and decision.

In Rutland and Washington Railroad Company *v.* Bank of Middlebury, 32 Vt., 639 [1860], plaintiff brought trover for conversion of ten railroad bonds of $1,000 each, and

recovered verdict of $9,000. After verdict, defendant offered, for the first time, to restore the bonds to plaintiffs and pay their costs, and moved for a rule that, upon surrender of the bonds and payment of costs, all further proceedings on the plaintiffs' part be stayed. The court below allowed the bonds to be brought into court, but plaintiffs refused to receive them, and they were deposited with the clerk; and the trial was again had on the merits, and verdict was given for nominal damages. The full court held, after argument by eminent counsel, Mr. George F. Edmunds appearing for the rule—

1. That the court below had full power, as incident to its character as a court of common-law jurisdiction, to permit, by order, the return of the property sued for, in mitigation of damages, and, upon payment of costs, to order that plaintiff should thereafter proceed at his peril as to future costs.

2. That this power would not be exercised when it would prevent plaintiff from full reimbursement for damages caused by the conversion, as depending on the value of the property; nor when the defendant's acts in taking and using the property disentitled him to favorable regard of the court.

3. That the discretion of the court below in granting or refusing the order was open to revision.

4. The rule in Fisher *v.* Prince, 3 Burr, 1363; Hart *v.* Skinner, 16 Vt., 138; and Yale *v.* Saunders, 16 Vt., 243, was affirmed.

5. As the defendants had acted in good faith, and the restoration of the bonds would put plaintiff into as good position as before suit, the order was made.

6. No special damages could be recovered, because none were alleged.

A similar practice obtains in Pennsylvania. The defendant applies to the court, at some convenient stage of the

cause, to stay the proceedings upon delivery of the article for which trover is brought, and payment of costs. The order is then granted, if the property remains in same plight and its value is unchanged; and, after delivery, the plaintiff proceeds for special damages at peril of costs.

Tracey *v.* Good, 3 Penn., L. J., 135 [1844].

The principle is recognized by leading text writers:

"If the defendant, after conversion, redeliver the goods, an action will lie for the original conversion, and the redelivery will only go in mitigation of damages. (Bull N. P., 46.) But the jury need not give more than nominal damages, even where the redelivery has been after action brought, unless actual damage has been occasioned either by an injury to the property converted or by the actual and necessary consequences of the conversion, as where money has been necessarily paid to recover the chattel. (Moon *v.* Raphael, 2 Bing. N. C., 315; per Tindal, C. J.) In some cases the courts will stay proceedings without going to trial, upon delivery of the thing claimed and payment of costs."

Mayne on Dam., [2d ed.,] 301–3.

The power of this court, sitting at common law, to compel the satisfaction of judgments at law by something else than the payment of money, was recently held by this court to be part of its jurisdiction as a court of common law. It effects substantial justice by the direct act of judicial power, and avoids circuity of action.

Blount *v.* Windley, 95 U. S., 173

"The judgment," says Mr. Justice Miller, in *Blount* v. *Windley*, "is only a contract, because it is evidence of a debt or obligation on the part of defendant due to plaintiff. The judgment itself presupposes, and is founded on, some antecedent obligation or contract, and is only a higher evidence of that contract, because it now has the sanction of the judicial determination of its validity and amount by a court of law. The essential nature and character of

the contract remains unchanged; and in deciding how far it may be affected by legislation, we must look mainly to the original contract.

"It may be assumed that all debts, not solvable by their terms in something else, are *prima facie* payable in legal-tender money, as ascertained by the acts of Congress. And this is true, whether the contract be express or implied, and whether it exist in parol, or in a promissory note, or in a judgment. Notwithstanding this general rule, it is a principle of long standing in all systems of jurisprudence, that one debt or obligation may be set off and counterbalanced against another, so that, while the obligation of both is recognized, both are satisfied in law and discharged without the payment of any money on either; and this is done by the courts without the consent of the party and against his will."

The learned judge then cites authorities showing that the power of setting off judgments against each other did not depend on statutes of set-off, but upon the general jurisdiction of the court over its suitors; and continues:

"It will be thus seen, that, *independent of statutes, the courts have long exercised the power of extinguishing judgments by compelling the plaintiff to receive something else than money in satisfaction thereof.*"

Accordingly, this court held constitutional a statute of North Carolina which allowed the defendant to set off against a judgment, recovered by a bank, its circulating notes, *which he had procured after the judgment was recovered*, because, so long as rights of third parties did not intervene, the extent to which mutual obligations could be set off against each other was wholly within legislative control.

The common-law rule, both in *trover and trespass*, seems to be this, as drawn from the cases and embodied by Mr. Washburn in his note to R. R. Co. *v.* Bank, 32 Vt., 639:

1. If the taking was willful, or refusal to surrender is willful and unqualified, or the property has been injured or

deteriorated in value, the defendant cannot compel the plaintiff to accept the property, even in mitigation of damages.

Hart *v.* Skinner, 16 Vt., 138.
Shotwell *v.* Wendover, 1 Johns., 65.
Oliver *v.* Perineau, Strange, 1191.
Fisher *v.* Prince, 3 Burr., 1363.

2. But if the defendant's possession was lawful, and his refusal to surrender was qualified, or if the conversion was technical only and without willful wrong on his part, and the property remains strictly *in statu quo*, the defendant may compel the plaintiff to accept it in mitigation of damages.

Pickering *v.* Truste, 7 T. R., 53.
Hayward *v.* Seaward, 1 Moore & S., 459.

a. And even if the plaintiff do not expressly consent, the defendant may show in mitigation of damages that the property has gone into possession of plaintiff or to his use.

Hart *v.* Skinner, 16 Vt., 138.
Yale *v.* Saunders, 16 Vt., 242.
Reynolds *v.* Schuler, 5 Conn., 323.
Baldwin *v.* Porter, 12 Conn., 373.
Kaley *v.* Shed, 10 Met., 317.

b. And the law will imply an acceptance where the property has actually gone into his use, and mitigate damages accordingly, and will reduce verdict, on motion, for acts done after verdict, as if on *audita querela*.

Plevin *v.* Henshall, 10 Bing., 24 [1833].
Irish *v.* Cloyes, 8 Vt., 30.

c. And will grant a rule that the judgment for damages be discharged on placing the plaintiff, by full delivery and payment of costs, in as good a position as he was before the action arose.

Coombe *v.* Sansom, 1 Dowl. & Ry., 201.
Earle *v.* Holderness, 4 Bing., 462.

d. Whenever there is no difference in the real value of the article between the time of conversion and the time of tender in mitigation.

Tucker *v.* Wright, 3 Bing., 601.
Gibson *v.* Humphery, 1 C. & M., 544.

Will this court adopt less liberal practice in *contract* than in *tort*?

II. The plaintiff is entitled to indemnity only. He has no right to force a purchase upon an unwilling and innocent purchaser, and the common-law courts have jurisdiction to prevent this injustice by shaping their procedure.

"That the measure of damages in trover covers the value of the goods, is only a *prima-facie* presumption. * * * The plaintiff in fact recovers no more than the amount of his loss. . . . . The true measure of damages in all these cases, is that which will indemnify the plaintiff for the breach."

Chinery *v.* Viall, 5 Hurl. & N., 288.
Johnson *v.* Stear, 15 C. B. N. S., 330, 335 [1863].

In this case a dock-warrant for brandies was deposited as pledge for a loan due on 29th. Pledge sold on 28th, pledgor being bankrupt. Pledgor's assignee recovered only nominal damages.

ERLE, C. J. "If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more; and that would be a nominal sum only. The plaintiff's action here is in name for the wrongful conversion, but in substance it is the same cause of action; and the change of form of pleading ought not in reason to affect the amount of compensation to be paid."

The rule applies "with equal force to, and has always governed, actions in any form, (trover, assumpsit, or case,)

where compensation in damages is claimed for refusal to deliver or illegal conversion of anything, to the property or possession of which the plaintiff is lawfully entitled."

Com. Bank of Buffalo *v.* Kartright, 22 Wend., 348, 367, [1839.]

The rule of the common law is that, where a party sustains a loss *by reason of a breach of contract*, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.

Robinson *v.* Harman, 1 Exch., 850, 855.

Neither trover nor detinue for the value of the shares, or for nominal damages, could be maintained for the eight shares which Reed pledged, because there was no conversion, and could be none until the debt was paid.

Halliday *v.* Holgate, L. R., 3 Exch., 299 [1868].

Donald *v.* Suckling, L. R., 1 Q. B., 585 [1866].

S. C., Big. Lead. Cas. on Torts, 394, *note.*

III. Reed still owns the $32,000 stock, and can compel its delivery at the present time.

"The old cases which hold that judgment in trover vests the property in the defendant (which would prevent the right of return after suit) have been overruled."

Big. Lead. Cas. on Torts, Id., 439, 440.

Brinsmead *v.* Harrison, L. R., 6 C. P., 584, 588 [1871].

WILLES, J. "We are of opinion that no such change is produced by the mere recovery. The proceeding in such an action is not a proceeding *in rem;* it is to recover *prima facie* the value of the goods. It may be that the goods have been returned, and the judgment given for nominal damages only. To say in such case that the mere obtaining judgment vests the property in the defendant, would be an absurdity. It is clear, therefore, that the judgment has no specific effect upon the goods. The only way the judgment in trover can have the effect of vesting the property in the

defendant is by treating the judgment as being (that which in truth it ordinarily is) an assessment of the value of the goods, and treating the satisfaction of the damages as payment of the price, as upon a sale of the goods, according to the maxim in Jenk 4th Cent. Case, 88. Any other construction would seem to be absurd."

Brinsmead *v.* Harrison was decided four years after this court had, in Lovejoy *v.* Murray, 3 Wall., 1, shown that, by the common law of England as well as of this court, nothing short of *satisfaction* of the judgment in trover sufficed to vest title to the property in the defendant; and Justice Willes follows the reasoning of Mr. Justice Miller's opinion and his construction of the English cases, and Lovejoy *v.* Murray was cited in argument.

"A party cannot," says Baron Parke, "recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant."

Laird *v.* Pim, 7 M. & W., 474, [1841.]

This was an action by vendor against purchaser for breach of contract to buy land.

"The measure of damages, in an action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is, how much worse off is the plaintiff, by the diminution in the real value of the land or the loss of the purchase-money, in consequence of the non-performance of the contract?"

2. Suppose this stock should suddenly rise to its par value of $32,000: Does the judgment now before the court bar the defendant from taking the certificates which the court below holds for him? Or from enforcing in equity specific performance of the contract to deliver these shares if Colby still held them? Even if the present case were trover,

Reed still owns the stock under the law of this court, and could compel its delivery if he chose.

Suppose this judgment stands, what is the position of defendant? Defendant does not acquire title to the stock, because the title is not in issue. On the contrary, the pleadings show it still to be in the plaintiff, and that the defendant has not delivered. The corporation has transferred the stock to Reed, and the court holds it subject to Reed's order, in Reed's name, on the books of the corporation. He sued for damages for failure to deliver, but he gets the full cash value of the stock and the stock itself. If this judgment stands, *and is satisfied*, does it bar an action in equity for specific performance? The record does not show trover, but only a judgment of damages *for not delivering the stock on a specified day.* That payment of damages for mere non-delivery will vest title to the stock in Colby, is a proposition which is, at least, not yet settled law.

In trover, the plaintiff's right to make an involuntary sale to the defendant of that property which the defendant has wrongfully converted to his own use, arises out of that defendant's *tort.* No man shall take advantage of his own wrong, and the defendant is obliged to pay for what he has unlawfully taken. But even for this wrong-doer there is a *locus pœnitential.* He can always restore property before action and plead the return in mitigation of damages. And if plaintiff can ever refuse to accept return, after suit brought, it is because the tort has estopped the defendant from disavowing his own wrong and given the plaintiff his election to sell judicially or to replevy. But the court below, in its judgment, applied to the defendant Colby a more severe rule than if he had been a wrong-doer.

Yet in the action at bar the defendant's right to deliver arises out of the same contract which imposes on him the duty of delivery. The plaintiff has neither released him from that duty nor deprived him of that right. He sues

upon his contract, and by so doing he affirms it; *i. e.*, the contract is still in force, and, while it binds, it also protects both parties to it. Reed should have accepted the tender, and, upon Reed's refusal, the court should have deducted the value of the stock when tendered from its value at time of the verdict. This course would have given the plaintiff Reed exact justice, and fulfilled the agreement of the parties with perfect indemnity to Reed for all actual damage and expense.

THIRD POINT.

No actual conversion being charged upon Colby, and every element of wrong-doing being absent from the case, Reed has no cause of action for non-performance of the contract, unless a proper and sufficient order is proved to have been given by him for the stock, before action, at Boston, the place for performance of the contract. An oral demand, made in Milwaukee, for an amount much too large, in the vague manner proved, is not sufficient to maintain the action.

1. The word "order," taken in its connection, shows that the contract intended a *written* demand. This is the fair construction of the contract under the customs of business, and especially applicable to the subject-matter, where the transfer of stock is concerned.

2. In this case, demand and refusal were essential facts, because there is not a scintilla of proof of any actual conversion, or intent to convert. The stock was rightfully in Colby's hands under the contract. He had paid for the whole amount himself, and merely held a part of it for Reed's benefit, and had a lien for a cash loan upon a portion, at least, of that part.

Thorogood *v.* Robinson, 6 Q. B., 772.

2 Chitty Pl., (16th edit.,) p. 619, 2.

Assuming, *pro hac vice*, that an oral demand was an "order" within the meaning of the contract;—was any sufficient and proper demand proved in law to support the finding of the jury?

The entire testimony, as to demand and refusal, is in the record; and the acts and words which Reed testifies to as constituting the demand actually made in Boston, amount only to general talk about his wish to adjust his account, and do not, in law, amount to a "demand." Yet the instructions of the court authorized the jury to *infer* from this general talk that a proper demand, not proved or testified to, had been made in Boston. The defendant contends that the evidence did not in law justify any such instruction. Reed knew exactly what he did. If he had ever made any real "demand" he could have stated when, where, and how, so that the court could pass upon the facts and circumstances, and their sufficiency *in law*. His statement, that he "demanded" the stock, begs the question of law; for his words and acts, on his own showing, were so vague and general, that, in view of the friendly relations of the parties, and especially in view of the fact that Reed had left the stock in Colby's hands for several years, the court should have instructed the jury as prayed, without any modification.

A demand *upon a bailee without hire*, to deliver up the property in his hands, ought not to be *inferred* in law. Inferences which might be justifiable and sufficient in order to charge a *wrong-doer* with conversion, whose conscience is quickened by knowledge of his own wrong, ought not be accepted in lieu of affirmative, positive proofs. Colby, as an innocent depositary, having no motive to keep Reed out of his property, was entitled to a plain and unmistakable demand. Before mere non-delivery should be held to amount to his absolute breach of a contract which he had no interest whatever to serve by breaking, acts and words *which would unmistakably inform his mind* that Reed was

demanding possession of his property, ought to be proved. Reed had no right to ask the jury to infer that any acts were done or words spoken to which he did not himself testify. He was the interested party. *He knew everything of his own knowledge on this point.* To establish a demand by himself and a refusal by Colby was vital to his cause of action; and the burden was on him to prove this fact by positive testimony, of words and acts done and uttered by himself. Unless the acts and words *proved affirmatively to be thus done and uttered* were enough to inform the mind of a reasonable, unsuspecting bailee that the "order" which the contract required was being given, the court was bound to instruct the jury that no sufficient demand under the contract was proved; *i. e.*, that all Reed's acts and words, if admitted, did not amount to the "order" required by the contract. A *consensus animorum* upon the fact of notice was necessary, and Reed's case failed in law unless he showed such words and acts on his part as Colby did in fact understand, or was bound in law as a reasonable man to understand, to be an absolute positive demand for this property, which had lain uncalled for in his hands for over four years.

3. The plaintiff was also bound to prove by positive testimony this plain and unqualified demand and refusal to have been made—

First. Either at Boston, the place of performance, or

Second. An agreement by Colby to change the place of performance to Milwaukee; and *then* a demand and refusal at Milwaukee.

The affirmative testimony of Reed proved neither the one nor the other. The jury found, without specification of place, a "demand" and a refusal. If this finding must be intended to mean that demand and refusal which was alleged in the complainant, (*i. e.*, at Milwaukee,) there is

not a particle of proof, and no finding, that Colby agreed to deliver in Milwaukee; and therefore this finding does not support the judgment.

If, however, this finding means a demand and refusal in Boston, no such demand is alleged in the complaint, or proved by the testimony, *unless the jury are allowed to infer from Reed's testimony that Reed did more than he himself says he did.* We contend that this action cannot be thus supported *by inference, made against an innocent depositary, of the facts which were, if real, within the personal knowledge of the plaintiff below.*

4. But, besides the deficiency in form, manner, and place, Reed's oral "demand," (which he seeks to substitute for that written order which unquestionably Colby supposed himself entitled to receive,) was not only for Reed's own $32,000 stock, but also for $13,000 stock which belonged to Colby himself. Reed's complaint claims $45,000; and he testifies that he always asked for $45,000; and he went to the jury upon his right to receive that amount, and persisted in his claim to that sum and no less, until the jury decided that he was wrong and Colby was right. Reed's testimony shows that the reason why he did not get the stock when he first asked for it in Boston was this difference of opinion between them as to the amount he should receive.

Reed himself testifies that Colby's objection to delivery was that Reed was asking too much.

In Abington *v.* Lipscombe, 1 Ad. & El. N. S., 776 [1841]; S. C., 1 G. & D., 233, trover for five horses and two cows was brought under claim for seven heriots, payable to the lord of the manor on death of the tenant for life. Plaintiff had verdict, but leave was granted defendant to move to reduce the damages if plaintiff was entitled to recover less than seven, or to enter nonsuit if the evidence did not show a conversion. The bailiff had seized and marked seven for

his lord, and the lord's title would have been absolute by the seizure of the seven if he had been entitled to so many, but he was entitled to take only five. The court held that there was no conversion of any of the heriots, and granted a nonsuit.

LORD DENMAN. "This was said to be no conversion, because the demand was too large; for if the demand had been correct, the defendant might possibly have complied with it, and his refusal to give up seven, when only five could be lawfully claimed, is no refusal to give up the five." After saying that this case showed no conversion without proof of demand and refusal, he continues: "But it was answered secondly, that a demand of all is in truth a demand of each, and that a detention of all is a detention of each. The ground of refusal may also be material. If the defendant had refused the seven, but declared himself ready to give up five, and the bailiff had persisted in demanding all and declined a smaller number, the demand would have been wrong, and the refusal justifiable. But in this case, though the demand was too large, the refusal proceeded on the ground that no heriot was due, and imported that the defendant would part with none of the beasts seized. And it is correct to say that that conduct of the defendant which is charged as a conversion must be taken altogether, and with all its circumstances. But the objection here arises at an earlier period, for the demand had reference to a seizure actually made of seven beasts when the plaintiff had only a right to seize five. Supposing it then to be clear that the demand and refusal amounted to a conversion of five, still it is left uncertain which five he lawfully seized. If he is entitled to the best beast as a heriot, he must form a judgment and exercise an option as to which is the best. This is clear from the case quoted on the plaintiff's part. (Woodland *v.* Mantel, Plowd., 94; Oldham *v.* Smith, Cro. Eliz., 589; Peter *v.* Knoll, Cro. Eliz., 32.) The court are of opinion that this objection must prevail, and the rule for entering a nonsuit be made absolute on this ground."

Although Abington *v.* Lipscombe was decided upon the ground, that under feudal law the lord was bound to select

his own heriots, and had here selected seven when he should have taken only five, and had left it uncertain what five beasts he had seized, and therefore justified the refusal to deliver any, the language of Lord Denman has been accepted by leading text writers as establishing the rule that a demand for too much will not support trover.

1 Addison on Torts, sec. 472.

1 Chitty Pl., [Perkins' Ed.,] 179 E[1].

But the present case is much stronger. Lord Denman's language was used in a case of trover where the refusal to deliver was absolute upon the ground that no heriot was due. Here the evidence shows that Reed asked a transfer of $13,000 more stock than he was entitled to, and Colby objected to the amount only. The matter dropped without any desire or willingness expressed, on Reed's part, to receive a portion of his claim, and without objection made, on Colby's part, to transfer the real amount due. No denial of Reed's right to receive the $32,000 stock was made. It might even be conceded that the instruction given by the court would apply to a tort-feasor; but it certainly is not the duty of one holding property rightfully *under a contract*, to volunteer a "delivery of such amount as the plaintiff might confessedly be entitled to," when the plaintiff claims persistently a much larger amount, and neither asks, nor indicates any willingness to accept, less than his whole claim.

The effect of a demand and refusal applies only to duties which the party's contract, or the rules of law, impose. The demand touches his conscience; and is notice to him to do that only which in conscience he ought to do. But a notice which does not suggest the duty, cannot affect him with liability for its non-performance. And if his specific duty is defined by a contract, this duty does not become active, until the precise "order" which the contract prescribes, is made. His contract protects him against every

other "order"; and the same rules which govern tender of performance by him, apply to the other party when he requires performance.

The contract is the law of the parties. Suppose a written order in favor of A, drawn by Reed upon Colby for $100,000 stock, had been presented by A to Colby in Boston: would Colby have been bound to deliver the $32,000 stock upon it? How would such an order differ from a bank check which exceeds the drawer's balance? And how is Reed's oral demand for too much, any more effective than his written order for too much?

This action, in all its phases, is governed by the rules which apply to contract, not tort. If a demand in trover for too much is bad, *a fortiori* a demand for $45,000 will not support this action for breach of a contract which bound Reed and Colby alike to the delivery of only $32,000 stock.

A demand, for an alleged balance of account, which is larger than the amount then really due, will not cause interest to run on the true balance from time of demand for the excessive sum, when the debtor is willing to pay the true balance.

Goff *v.* Rehoboth, 2 Cush., 475.
Lusk *v.* Smith, 21 Wis., 28.

A demand will not support a claim for interest, unless it is a separate and distinct demand for a debt or sum which is afterwards admitted or proved to be due.

Oriental Bank *v.* Tremont Ins. Co., 4 Met., 1.
Hubbard *v.* Charlestown Branch Railroad Co., 11 Met., 124.

But if tort enters into the case, interest runs, because there is no contract to protect the wrong-doer. His conscience makes demand for their return from the first moment that he wrongfully acquired the funds.

Woods *v.* Robbins, 11 Mass., 504.

The demand must be a "separate demand of a debt or sum which is afterwards proved or admitted to be due, and not a demand for such a debt or sum together with another which is afterwards proved or admitted not to be due."

Lusk *v.* Smith, *supra.*

Wood *v.* Hickok, 2 Wend., 501.

Doyle *v.* Adm'r. *v.* St. James Church, 7 Id., 179.

FOURTH POINT.

Interest on the value of the stock from May 27, 1875, was wrongly included in the judgment, even if it is otherwise correct.

If Reed is allowed interest, he can go into the market, replace his stock by purchase, and thus regain all his stock, (which is worth at the time of the verdict what it was worth on May 27, 1875,) and retain as a clear *bonus* the interest on that value. The stock itself carried all its accrued dividends *ex vi termini;* and if any dividends had been collected by Colby, they were recoverable as special damages. He would, if this judgment stands, receive full indemnity, and also a bonus of $588, though no special damages are alleged or proved, and though the defendant is not in any aspect of the case a wrong-doer.

Where a company improperly refused to issue shares upon tender of the calls made and interest on the calls, the Court of Exchequer Chamber, on special case made, allowed the plaintiff below to recover the market value of the shares on the day of the tender, less the amount of the tender.

The case stipulated that the amount of the judgment should be settled by the court, and plaintiff applied specially for interest, but the court refused it,—Martin, J., say-

ing that the plaintiff might be very well contented with what he had got.

Van Dieman's Land Co. *v.* Cockerill, 1 C. B. N. S., 732, 752.

"When contracts for sale of chattels are broken by the vendor failing to deliver the property according to terms of contract, it seems to be well settled as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when it should be delivered, upon the ground that this is the plaintiff's real loss, and that with this sum he can go into the market and supply himself with the same article from another vendor. It follows from this rule that if at the time fixed for the delivery the article has not risen in value, the vendee, having lost nothing, can recover nothing."

Sedg. on Dam., 260.
Shepherd *v.* Hampton, 3 Wheat., 200.
Gray *v.* Portland Bank, 3 Mass., 364.

And there is no just distinction between stock and any other vendible commodity.

Sedg. on Dam., 273.
Copper Co. *v.* Copper Mining Co., 33 Vt., 92.
Shaw *v.* Holland, 15 M. & W., 136.
Rand *v.* White Mountain R. R., 40 N. H., 79.
Tayloe *v.* Turner, 2 Cr. C. C., 203.
Gilpin *v.* Consequa, Peters' C. C., 85.

And the payment of this difference is full indemnity to the purchaser for the injury sustained by breach of the contract.

Rand *v.* White Mountain R. R., *supra.*
Thompson *v.* Alger, 12 Met., 443.
Allen *v.* Jarvis, 20 Conn., 38.
Phillpots *v.* Evans, 5 M. & W., 475.

In detinue for railway scrip, the measure of damages is the difference between its value at time of demand and its value when delivered. In this case they were delivered, after action brought, on a judge's order obtained by defendant.

Williams *v.* Archer, 5 C. B., 318 [1847].
S. C., 2 Car. & K., 26.
Tempest *v.* Kilner, 3 C. B., 249.
Com. Bank of Buffalo *v.* Kortright, 22 Wend., 348.
Wilson *v.* Little, 2 Comst., 443.

On breach of contract for sale of shares, the measure of damages is the difference between the contract price and market price at time of breach.

Powell *v.* Jessopp, 18 C. B., 336.
Shaw *v.* Holland, 15 M. & W., 136.
Van Dieman's Land Co. *v.* Cockerill, 1 C. B. N. S., 732 [1857].

Under the English rule, in its most stringent form, as applied in a suit for damages for not returning shares lent on a contract to return upon a specified day, the plaintiff can only recover the value upon the day of trial.

Owen *v.* Routh, 14 C. B., 327.

EDWIN H. ABBOT, *Attorney,*
For Plaintiff in Error.

Supreme Court of the United States.

GARDNER COLBY, Plaintiff in Error,

vs.

GEORGE REED, Defendant in Error.

This is a writ of error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Reed sued Colby in assumpsit upon a contract to deliver him certain railroad company stock, which Colby agreed to obtain and deliver, &c.

The declaration alleged demand and refusal to deliver the stock and its value, and claimed damages, &c.

Record, 2, 3.

The answer denied demand, refusal, &c., and set up a counter-claim or set-off; and that it was agreed between the parties, that in case it became necessary for the defendant to increase his subscription to the fund to build the road, from two to three hundred thousand dollars, and to pay the same, then the defendant should retain the amount of $5,000 out of the stock to be delivered to the plaintiff, &c.

Record, 4, 5, 6.

The case was tried by a jury, which returned a special verdict to the following effect:

1st. That a demand was made for the stock before the commencement of the suit.

2d. That the defendant refused to deliver the stock.

3d. That there was an agreement that plaintiff should release to the defendant the excess over $40,000 of the stock, should the defendant subscribe for $100,000 additional, and that such subscription was made.

4th. That the thirty days' notice of such additional subscription was waived.

5th. That plaintiff was entitled to demand and receive $32,000 of said stock.

6th. That the cash value of the stock to which the plaintiff was entitled on or about May 27, 1875, was $9,600.

7th. That there has been no change in the value of the stock.

Interest upon the value of said stock was computed, making a total of $10,188, from which was deducted the counter-claim or set-off of defendant, amounting with interest to $2,548.28, leaving $7,641.72, for which judgment was entered for the plaintiff, with costs, $49.82.

I.

The bill of exceptions in this case does not purport to contain all the testimony given upon the trial of the cause. The presumption is in favor of the verdict. Courts will not set aside a verdict unless it appears affirmatively that the bill of exceptions contains all the testimony given upon the trial.

Dernier v. *Durand*, 15 Wis., 580.
Moul v. *Moul*, 30 Wis., 203.
Paine v. *Smith*, 32 Wis., 339.

II.

This court will not re-examine the facts once tried by a jury in an action at law.

Parsons v. *Bedford*, 3 Pet., 433.

III.

Where there is a breach of contract the defendant must respond in damages. The damage claimed in this case is the value of the stock, and judgment must be rendered for amount proven.

Chitty on Pleadings, 338.

IV.

It is admitted by the answer that a demand or request for the stock was made and refused before the commencement of this action. The jury also so find. This is also supported by the testimony. No objection was made by the defendant at the time to the sufficiency of the demand. By the contract the defendant agreed to pay over and deliver the stock upon the order of the plaintiff. (Folio 7.)

This order was made both at Boston and Milwaukee by the plaintiff, and not complied with, as found by the jury. (Folios 28, 29.)

The demand was sufficient.

No stricter rule could be required than in an action of trover, and the demand in such case would have been sufficient.

No particular form is necessary.

Per Lord Kenyon, 1 *Esp.*, 33.

1 *Chitty on Pleadings*, 159.

The defendant was advised, by plaintiff's request, that he desired the stock in question. If he considered that we

were not entitled to all of it, he should have offered to deliver so much as he considered us entitled to. The stock was all of the same character,—one share as good as another.

Defendant, by his agreement, was to take and procure the stock from Phillips & Colby, and pay over and deliver the same to the plaintiff, on his order. (Folio 7.)

After the commencement of this action, and at the trial, defendant offered to deliver the stock. An offer to pay is a waiver of any objection to the form of demand.

Bank of Commonwealth of Ky. v. *Wister*, 2 *Pet.*, 318.

As to the motion made at close of testimony, on trial, that the plaintiff be ordered to accept stock, in mitigation of damages to be recovered by plaintiff, we say the offer comes too late. There is no authority for such an order.

Suit is for breach of contract. No tender was made before suit was brought.

Plaintiff was entitled to recover the value of the stock found to be due him by the jury, at the time of demand, on the 27th day of May, 1875, *with interest from the time of demand.*

Clark v. *Pinney*, 7 Cow., 681.
Bush v. *Canfield*, 2 Conn., 485.
Barnard v. *Conger*, 6 McLean, 497.
Halseys v. *Hurd*, 6 McLean, 102.
Dana v. *Fiedler*, 2 Kernan, 40.
Vaughn v. *Howe et al.*, 20 Wis., 497.

This motion was renewed after ~~service~~ verdict. The motion was denied, Judges Drummond and Dyer presiding.

The authorities cited by defendant, on this motion, refer to the action of trover. In this case plaintiff could not maintain trover; plaintiff never had possession.

It was an agreement to deliver stock to plaintiff. The stock was not identified.

In the case of *Wheeler* v. *Perles*, 43 Wis., 332, it was held, that a person having wrongfully controverted a policy of insurance, left with him as security, must be presumed to have in his possession its market value in cash, or its equivalent; and it was held that plaintiff could not be compelled to accept the policy in mitigation of damages.

There is no error in the admission of testimony, or in the charge of the court.

MATT H. CARPENTER,
Of Counsel for Defendant in Error.